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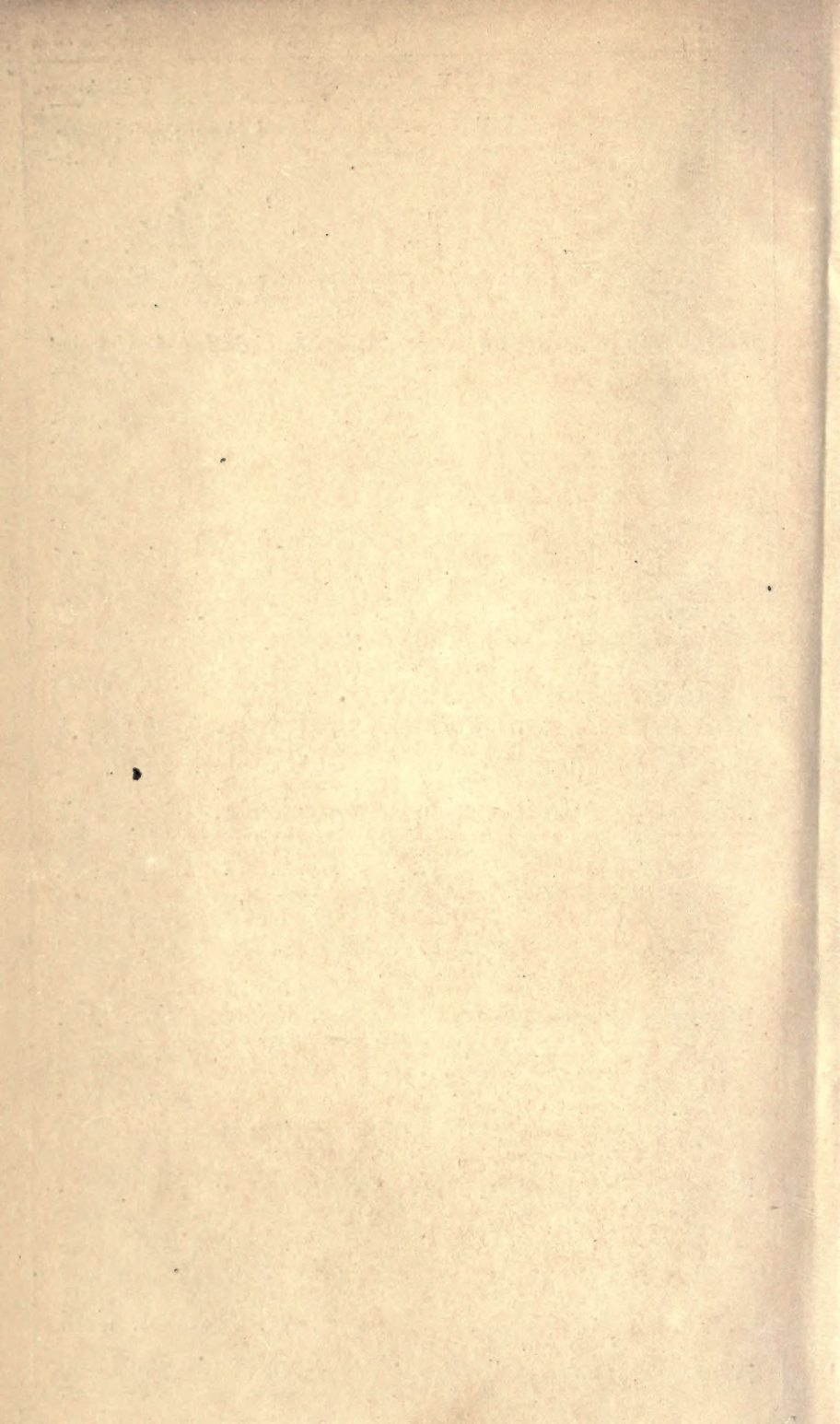
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MINES, MINERALS, AND QUARRIES.



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THE LAW

RELATING TO

MINES, MINERALS, & QUARRIES

IN

GREAT BRITAIN AND IRELAND;

WITH

A SUMMARY OF THE LAWS OF FOREIGN STATES,

AND

PRACTICAL DIRECTIONS FOR OBTAINING GOVERNMENT GRANTS

TO WORK FOREIGN MINES.

BY

ARUNDEL ROGERS, Esq.

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

LONDON:

V. & R. STEVENS, SONS, AND HAYNES,

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## ADDENDA ET CORRIGENDA.

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*\* \* The Reader is requested, before perusing this Volume, to insert in the respective pages referred to, the following additions and corrections.*

- Page 20, line 6, after the word "Continent" refer to Lord Denman's judgment in *Acton v. Blundell*, post, p. 501.
- 49, 11, for "fifth," insert "fiftieth."
- 54, note *v*, add:—*United States v. Castillero*, 2 Black. (U.S.) 17, 195, 335.
- 56 } as to Mexican grants being acknowledged by the  
to } United States of America, see *United States v. Cas-*  
61 } tillero, *suprà*.
- 73, *b*, erase the comma.  
*e*, for V. insert 5.
- 74, *f*, erase "Lib."
- 79, line 25, before the word "strong" insert the word "are."
- 90, note *v*, add:—*Constable v. Nicholson*, 11 W.R. 698
- 111, line 23, add:—"s" to the word "possession."
- 112, 22, after Geo. III. add:—c. 60; also 42 Geo. III. c. 116.
- 118, note *v*, add:—*Blewitt v. Tregoning*, 3 Ad. & Ell. 570;.
- 129, line 25, add:—see post, p. 150.
- 144, note *f*, add:—*Smart v. Jones*, 12 W.R. 430.
- 150, line 22, add:—26 & 27 Vic. c. 49, s. 37.
- 152, note *d*, for "post" insert "ante;" and add:—post, p. 411.
- 154, *g*, add:—7 Will. IV. & 1 Vic. c. 28.
- 161, *g*, add:—*Ernest v. Vivian*, 12 W.R. 298.  
*i*, add:—*Bagot v. Bagot*; *Legge v. Legge*, 33 L.J. Ch. 116.
- 163, *f*, add:—*Bagot v. Bagot*, *suprà*.  
*g*, add:—*Smart v. Jones*, 12 W.R. 430.
- 169, *b*, for 92 insert 29.
- 172, *g*, add:—*Lewis v. Branthwaite*, 2 B. & Ad. 437.
- 177, *d*, add:—9 Ho. Lords Ca. 692.
- 179, *f*, add:—9 Ho. Lords Ca. 692.
- 199, line 27, for "especial," insert "special."
- 201, note *o*, add:—32 L.J. Ch. 402.
- 211, for "danger," in marginal note, insert "damages."
- 214, line 24, instead of "in continuation," insert "caused in execution."
- 218, 17, insert "and at law he is answerable for a tort, *Burnard v. Haggis*, 32 L.J. C. P. 189."
- 227, insert the page.

- Page 229, note *c*, insert 7 Will. IV. & 1 Vic. c. 28.  
 248, line 15, add:—"s" to the word "cheek."  
 251, for "subject," in marginal note, insert "bequest."  
 254, note *f*, add:—Legge *v.* Legge, 32 L.J. Ch. 116; 33 L.J. Ch. 122.  
 260, *d*, add:—Ernest *v.* Vivian, 12 W.R. 298.  
 261, line 4, erase "hands," and insert "lands."  
     note, *j*, add:—Beardmore *v.* Tredmill, 3 Giff. 683.  
     *k*, add:—and peruse Eaden *v.* Firth, 1 Hem. & M. 573.  
 262, *n*, add:—to "Bamford *v.* Turnley," 9 Jur. N.S. 377; and  
     to Beardmore *v.* Tredwell, add:—3 Giff. 683.  
 268, *a*, add:—Smart *v.* Jones, 12 W.R. 430.  
 271, *g*, also add:—Smart *v.* Jones.  
 283, *g*, add:—Willway's Trust, 32 L.J. Ch. 226.  
 284, *c*, also add:—Willway's Trust.  
 289, *w*, for Bennill, read Bennitt.  
 293, *a*, erase "see ante, 6."  
 294, *f*, add:—Barrs *v.* Lea, 12 W.R. 525.  
     *g*, also add:—Barrs *v.* Lea.  
 311, *a*,  
 312, *g*,  
 313, line 17, } add:—Smart *v.* Jones, 12 W.R. 430.  
     note *p*,  
 316, *g*, before "Schmoeck," add:—"Ellis *v.*"  
 334, line 10, instead of "the law," insert "there was."  
 340, note *b*, for "Polwhale," write "Polwhele."  
 363, *a*, for "Smith," write "Smirke."  
 411, add:—"s" to "custom" in the margin.  
 446, *t*, add:—Smart *v.* Jones, 12 W.R. 430.  
     *w*, for "Pryer," write "Pyer;" and add:—Suffield *v.*  
         Brown, 33 L.J. Ch. 249.  
 447, *y*, for "Damel," write "Daniel."  
     *c*, add:—Kavanagh *v.* Coal Mine Co. 14 Ir. Com. L. 82.  
 452, *v*, add:—Polden *v.* Bastard, 32 L.J. Q.B. 572; Suffield *v.*  
     Brown, 33 L.J. Ch. 249.  
 454, *q*, instead of "64," write 764.  
 503, *u*, add:—Reg. *v.* Metropolitan Board of Works, 3 B. & S.  
 505, line 31, for "Simpson," write "Sampson."  
 507, 23, for "Barnet," write "Burnet."  
 508, note *x*, for "Stephens," write "Stevens."  
 577, *h*, add:—"Ernest *v.* Vivian, 12 W.R. 298."  
 578, *j*, also add:—Ernest *v.* Vivian.  
 584, line 29, add:—"the fact of a workman being a fellow-labourer,  
     is a question for the jury, Fletcher *v.* Peto, 3 Fost. &  
     F. 368."

# THE LAW

## RELATING TO

### MINES, MINERALS, AND QUARRIES.

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#### CHAPTER I.

*The value of Minerals in a Commercial point of view. Importance of Mining Law to all classes. Explanatory observations showing the nature and extent of the several topics discussed in this volume. Advances to Mines and Collieries out of the Consolidated Fund. Income and Property-Tax. Indefeasible Title —25 & 26 Vic. c. 53.*

*Mineral Statistics. Gold. Silver. Coals—waste and exhaustion of coal-beds. Copper. Iron. Lead. Tin. Earthy and other Minerals.*

To the mineral productions of Great Britain and Ireland must be mainly attributed that high commercial position which the geographical extent and population of the two islands would scarcely have led us to expect. With her coal England has kept every part of the empire in vigorous operation, and is provided with the means of enhancing the domestic comforts of the people; with her iron she has promoted the Arts, added to her material strength, and produced some of the finest pieces of mechanism the world has ever seen; and with her lead, tin, and copper, she has increased the security, and supplied some of the most urgent necessities of the nation. Conjointly, these several productions have given her a commanding trade, rendered her pre-eminence the envy of other nations; and aug-



mented the resources, stimulated the energies, and proved a blessing to the great mass of the community. Scotland and Ireland have contributed to these results.

Importance  
of mining  
law to all  
classes.

The law relating to mines is therefore of universal importance, but especially to those who are more immediately affected by it. To the Prince, as a large landed proprietor and possessor of extensive mineral rights,—to the Peer, as hereditary counsellor of the Crown and final arbiter of every litigated mineral question,—to the Landowner, who may be called upon at any moment to establish his rights, resist obtrusion, abide by the acts of his agents, or to give compensation for injuries done by them or his workmen,—to the Adventurer, who expends his capital in exploring the hidden treasure of the soil,—to the Merchant, whose dealings must be conducted in accordance with the peculiar laws and customs which prevail in particular districts,—to the Manufacturer, who must not commit a nuisance or suffer a dangerous vapour to continue when bringing the rude matter into due form,—and to the Labourer and Artisan who, on the one hand, are subjected to civil and criminal proceedings for acts of omission as well as commission wilfully incurred in the course of their employment, and on the other, have a remedy for all grievances or injuries to which they may be subjected by the oppression, negligence, or commands of their employers,—to one and all the law relating to mines is thus shown to be of considerable importance. From those, indeed, who have neither time nor capacity to enlarge their views beyond the contracted sphere in which they are appointed to move, a superficial acquaintance with the laws under which they labour is all that can be expected; but for those on whom greater obligations or duties are imposed, and whom an ignorance of the law upon this subject would expose to many penalties, a better knowledge of the law is indispensable.

Explanatory  
observations.

To carry out effectually the design of the work, the writer soon discovered that it would be necessary not only to consult the Roman Code, but to refer generally to the laws of other nations. Attention has therefore been directed to the

Roman Law, not because there is any obligation to recognize that law, but because many of its principles form the foundation of our own laws, and are frequently referred to and acted upon by the judges in the absence of English authorities (*a*). For instance, in this country, it not unfrequently happens that the ownership in minerals is distinct from the ownership in the soil, and that customary rights *in alieno solo* are claimed, and occasionally indisputably established. The same distinct rights were acknowledged under the Roman Empire. Again, the law relating to easements and servitudes (*b*) is based upon the Roman Law, and in some recent cases, that law has been referred to and adopted, more particularly on the right to streams and water-courses (*c*).

Attention is then directed to the laws relating to the principal States of Europe and America, on account of the growing importance of the subject, arising out of commercial treaties, the increasing mineral productions of foreign countries, and the consequent increase of English capital embarked in exploring the mineral wealth of foreign States (*d*). This, it is believed, is the first attempt which has been made to bring before the English lawyer the leading principles of foreign mining laws. In addition to a summary of the laws of each State, there will be found the French laws of 1791 (*e*) and 1810 (*f*)—the basis of the legislation on mines in the principal States of Europe. And as it is desired to make this work practically useful, the mode of obtaining Government grants for exploring mines in the lands of private persons is pointed out; in some foreign countries the mode is complicated, and we have consequently been the more explicit upon this subject, especially as regards Germany (*g*) and Spain (*h*). In this part of the volume will be found a few leading decisions on the law of foreign contracts and judgments, and the domicil of companies established

(*a*) Post, pp. 17, 327; Lord Denman's judg. in *Acton v. Blundell*; post, pp. 496, 501.

(*b*) Post, pp. 440, 455.

(*c*) Post, pp. 484, 501.

(*d*) Post, p. 21.

(*e*) Post, p. 25.

(*f*) Post, p. 32.

(*g*) Post, pp. 47, 48, 50.

(*h*) Post, p. 53.

for working foreign mines. These decisions show the control which will be exercised over owners or part-owners in foreign mines, resident in the British Isles, by our Courts, when the works and places of business are abroad, and when the place of business only is at home. The comparatively small space given to this part of the work, will, we hope, be useful to persons engaged in foreign mines, or who may be desirous of embarking in them.

Having concisely stated the Roman Law, and the laws of foreign countries, the writer has passed on to the consideration of the main subject of this volume: the law relating to the mines, minerals, and quarries of Great Britain and Ireland. Here a vast field has to be explored. The leading principles of the law must first be ascertained and then applied to the various complicated questions involved in our investigations. To those unacquainted with law a more easy method would suggest itself. They would expect mining law to be learnt as though it were a complete science of itself; but to the lawyer a different mode of investigation is apparent. He soon discovers that the law relating to mining is founded upon the general law of the land; is, in fact, a part of the whole system; an addition to, rather than a variation from, or distinct branch of, the science of jurisprudence. It is therefore proposed to take a comprehensive view of the law of mining; and we shall now explain in detail the various questions referred to in this part of our work.

The rights of the Crown (*i*) will first engage attention. Under this title the discovery of minerals will be shown to have long preceded the settled rights or even the early pretensions of the Crown (*j*). The nature and extent of the claims of the Crown, however, will be traced from the Conquest down to the time of passing an Act to prevent disputes and controversies concerning Royal mines (*k*), and from this latter period, the legislative enactments respecting the rights of the Crown under the High Seas (*l*) and the Sea-shore (*l*),

(*i*) Post, p. 72.

(*j*) Post, p. 75.

(*k*) Post, p. 88.

(*l*) Post, pp. 89-101.



and Royal rights in Derbyshire and Gloucestershire. The prerogative of the Crown in Ireland will be shown to be similar to, and that of Scotland to be different from, the prerogative in England. These questions are considered, and so are the rights of the Crown, by prerogative, by seignory, and by statute.

The rights of the Duchy of Cornwall partaking of the nature of Royal rights, will follow next in order (*m*). The title of the Prince will be traced through a series of five hundred years and upwards, and will be shown to have been indisputably established by Act of Parliament (*n*). The peculiar nature of the interest of the conventional tenants, and the Duke's title to the minerals (*o*), once the cause of litigation, will be fully discussed; and the numerous Acts of Parliament, including the recent Act, 26 & 27 Vic. c. 49, for enabling the Duke and his council to make grants, sales, exchanges and leases (*p*), of the Duchy possessions, will undergo a careful review. Considering the extent of the mineral possessions of the Duchy, and the absence of all previous acquaintance with this exceptional branch of mining law, the information here given will materially assist in the investigation of the law respecting the mineral rights of the Duchy.

As one of the questions raised in this volume is the distinction between a mine and a quarry, and what substances are or are not minerals, an attempt will be made to define these terms agreeably with the decisions of our Courts (*q*). The importance of the distinction will be apparent to those who have been called upon to advise on the construction of deeds or wills, wherein those terms have been used.

The law of real property will then be considered in all its bearings as it affects mineral rights. The title of the owner of the fee in freehold lands and of the lord of the manor in copyhold lands (*r*) will be fully discussed; and when several distinct rights exist under the same free-

(*m*) Post, p. 107.

(*n*) Post, p. 119.

(*o*) Post, pp. 121, 128.

(*p*) Post, p. 130.

(*q*) Post, p. 143.

(*r*) Post, p. 151.

hold (*s*), we shall take into consideration every question which has arisen out of the severance of the estates. The law of dower (*t*), and the interests of all persons having limited interests, or less than a freehold estate of inheritance, will be here reviewed; and when open but not unopened mines or quarries may be worked, it will be shown what are open mines and quarries in a legal sense (*u*). Copyholds (*v*) will be fully noticed, and the Enfranchisement Acts (*w*), which so deeply affect mineral rights. The ownerships in commons, and in waste and enclosed lands, as well before as since the numerous Acts passed for the enclosure of those lands, will be also considered. The right to minerals under railways, highways, canals, and water-works, as affected by the Land Clauses and Railway Clauses Acts (*x*), has rendered it necessary to refer to the decisions respecting the right of the owners of the soil to work the minerals not purchased by the company, the measure of support to be given to public works from the soil and minerals beneath the soil, compensation for severance of lands, assessment of damages, and other similar questions of importance. The Statutory provisions relating to the property of persons under disabilities: such as, infants, married women, idiots and lunatics; of persons having a Statutory title: as assignees of bankrupts and official liquidators; and the rights of mortgagees, are reviewed.

A chapter is added on the right of Ecclesiastical, Eleemosynary, and Municipal, Corporations to work mines (*y*). Independently of mining, no treatise of which the author is aware contains so complete a history of the laws relating to Church property. In addition to common law rights, the statutory powers of all ecclesiastical persons, aggregate and sole, are fully considered; and the numerous recent Acts passed for enabling them to grant mining leases (*z*), and leases of water, way-leaves, and other easements, are abstracted. The legality of bequests of mining property to Charitable Institutions is then considered (*a*).

(*s*) Post, p. 152.

(*t*) Post, p. 163.

(*u*) Post, p. 161.

(*v*) Post, p. 171.

(*w*) Post, p. 181.

(*x*) Post, p. 196.

(*y*) Post, p. 234.

(*z*) Post, p. 238.

(*a*) Post, p. 250.

Injuries to real property, as they affect mining, will be discussed, under the titles of Waste and Nuisance (*b*); and some useful cases are then referred to, respecting the obligation of owners of mines to provide fences to dangerous machinery and shafts, the neglect to do so constituting, in the eye of the law, a nuisance.

Having reviewed the law respecting mineral rights as an integral part of the law of real property, we have passed on to the rights of owners to alienate their property (*c*). This has led to a discussion on the rights of alienation in general, and the principles especially which govern the law of caveat emptor, deceit, and specific performance of mining contracts, the statutory powers to alienate settled estates, either wholly or in part, and to grant mining leases and licenses (*d*). The law respecting mining leases, and the construction of the clauses and covenants usually in them, as well as leases granted under powers (*e*), form a subject of special investigation. Licenses will be defined; and the distinction between a license and a lease, in its legal bearings, shown (*f*). The sale of mining shares (*g*), and the title to machinery and fixtures (*h*), and the law respecting a devise of mines (*i*), will fall under the chapter of alienations, and conclude that portion of the work.

Title by prescription and custom (*j*) is one of the most complicated branches of mining law, and the courts have recently shown but little disposition to favour it. The distinction between prescription and custom, the requisites of a good title to either mode of acquiring mineral rights, and the general effect of the Prescription Act, will be fully investigated, and the most recent decisions reviewed. The laws and customs of particular districts are then enumerated and explained (*k*).

The nature and character of Easements and Servitudes, and the manner of acquiring and losing them, will form the

(*b*) Post, p. 253.

(*c*) Post, p. 268.

(*d*) Post, p. 280.

(*e*) Post, p. 287.

(*f*) Post, pp. 287, 311.

(*g*) Post, p. 314.

(*h*) Post, p. 317.

(*i*) Post, p. 322.

(*j*) Post, pp. 327-339.

(*k*) Post, pp. 340-439.



subject of the next chapter. A concise and, it is hoped, a clear summary of the leading principles in this branch of law is given. The Roman Law forms the basis of our propositions, and the masterly judgments of the American lawyers will be freely and extensively quoted (*l*). From these principles we have endeavoured to show that there exist three important rights:—the right of support which an owner is entitled to receive for his mine from the adjoining, adjacent, and subjacent soil, and, vice versâ, the right of support which the owner of the soil and of buildings is entitled to receive from the minerals beneath the soil, when they are distinct properties (*m*), including support to railways, public works and canals, when constructed in pursuance of Acts of Parliament (*n*); the right to streams and water-courses, the diversion and defilement of water, subterranean and spring water, artificial waters and water-courses (*o*); rights of way and way-leaves (*p*). We shall be necessarily led to a consideration of the remedies for the violation of the easements and privileges above specified. In some instances it will be said the right is not a mere easement, but a right *ex jure naturæ*; we have admitted this, and endeavoured to point out the difference (*q*).

The rating of mines, minerals, and quarries, materially affects their value. The law, therefore, of poor's rates, highway and county rates, and of tithes, and the principles upon which they are applicable to mines, will be explained (*r*).

The numerous accidents which have recently occurred in mines have compelled the Legislature to interfere so as to prevent as far as possible their recurrence. Inspectors have accordingly been appointed with full power to examine and inspect mines, and to report on their state and condition; special and general rules for the regulation of the mines and workmen are to be adopted; the employment of boys and girls under certain ages, and in a capacity for which they are unsuited, are prohibited; and more

(*l*) Post, p. 440.

(*m*) Post, pp. 455, 472.

(*n*) Post, p. 476.

(*o*) Post, p. 484.

(*p*) Post, p. 506.

(*q*) Post, pp. 466, 473, 484, 486.

(*r*) Post, p. 515.

shafts than one, except under special circumstances, for the ingress and egress of the colliers are to be provided. These and similar provisions for the better regulation and inspection of mines have proved of considerable value to the mining community, and are, in addition to the remedies before justices for the recovery of wages, the punishment of misdemeanors, and the illegal combination of masters and workmen, considered in the nineteenth chapter (*s*).

Coal being a mineral, and minerals in their raw state comprised in our subject, the law of the coal trade in London and the provinces has not escaped notice (*t*).

Having collected the whole law upon mines, minerals, and quarries, I have included, civil remedies, both at law and in equity, as well as criminal offences (*u*) respecting mineral property. I have shown what is the proper remedy at law for the recovery of a mine or tin-bounds, for the use and occupation of a mine, or minerals, for injuries consequent upon the withdrawal of support to lands or minerals, interference with the rights of another to water, and to barriers, and the improper or wrongful working of minerals (*v*). Equitable remedies in the form of obtaining relief in mining contracts, accounts between partners, foreclosure and redemption suits, and the appointment of receivers and managers of mines where the joint owners cannot agree on important questions respecting the management of their property, will follow; and the concurrent jurisdiction of the Courts of Law and Equity in applications for directing the inspection of adjoining mines, and the granting of Injunctions, will be explained. Under the heading of civil remedies, will be discussed the law of masters and workmen; the right of action which a workman has against his master, or the owner of the mine, for injuries caused to the workman by or through the negligence of the employer; the remedy of the master against strangers for causing the workman to leave his employment; and the remedies of strangers against masters for injuries caused by the negligence of the workmen (*w*). And in order to

(*s*) Post, p. 529.

(*t*) Post, p. 554.

(*u*) Post, p. 601.

(*v*) Post, p. 569.

(*w*) Post, p. 580.

complete our review of civil remedies at law, a chapter has been added on pleadings in actions relating to the remedies provided for a breach of any contract or the violation of any right. Most of the cases referred to in this chapter will contain forms of pleadings applicable to the particular remedy sought (*x*).

We conclude the work by giving forms of leases and licenses for searching for minerals and carrying on mining operations (*y*).

Advances  
to mines  
and col-  
lieries out  
of the Con-  
solidated  
Fund.

As they cannot conveniently be inserted elsewhere, we here give place to some further particulars of mining. The 5 & 6 Vic. c. 9, s. 11, authorizes the Commissioners of Public Works to lend and advance money out of the Consolidated Fund, to any person or company, for the support of any mine or colliery.

Income-  
tax.

The income-tax is payable on all profits arising from mines and quarries situate in the United Kingdom, and on the profits of mines and quarries accruing to persons resident in the United Kingdom from mines and quarries situate out of the United Kingdom (*z*); and by 23 & 24 Vic. c. 14, s. 7, persons assessed to the duty chargeable under schedule A of the 16 & 17 Vic. c. 34, in respect of any mine or quarry, may appeal against any such assessment to the commissioners for special purposes, instead of the commissioners for general purposes.

Inde-  
feasible  
title.

Under the 25 & 26 Vic. c. 53, being an Act to facilitate the proof of title to, and the conveyance of, real estate, it is provided by section 9 that it shall be stated, in the description of the land to be so furnished by the applicant, whether he does or does not claim to be entitled to all or any part of the mines and minerals under such land, and unless in such description mines and minerals shall be expressly mentioned, it shall be the duty of the registrar to have especial regard thereto, in all subsequent inquiries to be made by him with respect to such lands, and in the investigation of the title thereto, and also in the services of such notices as are required by the statute.

(*x*) Post, p. 592.

(*y*) Post, p. 610.

(*z*) 16 & 17 Vic. c. 34.



There is one more topic which will add to the usefulness of the book—the mineral statistics of the United Kingdom. Mr. Hunt, who has for some years favoured us with these statistics, informs us in his last publication, that the amount and value of our mineral productions for the year 1862-63 were as follows:

	Oz.	Value.
Gold . . . . .	5,299	£ 20,390
Silver . . . . .	686,123	189,041
	Tons.	
Coals . . . . .	81,638,338	20,409,584
Copper . . . . .	14,843	1,493,241
Iron (pig) . . . . .	3,943,469	9,858,672
Lead . . . . .	69,031	1,436,345
Tin . . . . .	8,476	983,216
Zinc . . . . .	2,151	50,548
Estimated value of other minerals, about . . . . }	. . . .	2,000,000
Total . . . . .		<u>£36,441,037</u>

If to the above amount is added the value of minerals of which no returns have been received, we may safely calculate the value of the mineral productions of the United Kingdom for the year 1862-63 at not less than £40,000,000 sterling.

In 1861-2 the value of the discovery of gold amounted to about £10,000; but in 1862-3, as above stated, to £20,000; and there are now contemplated, or in actual operation, more than twenty workings which are called gold mines. What may be the return from these mines is a matter of conjecture; but there is no doubt that it will be far in excess of either of the preceding years. With the exception of about 200 tons of ore, which, from its extreme richness, may be classed as silver ore, the silver is extracted from our lead. The before-mentioned return of silver ore shows a steady increase on the few preceding years.

Mr. Hunt estimates that 83,635,214 tons of coal were raised in the United Kingdom for the year 1861. Of this amount Durham and Northumberland, with 271 collieries, contributed 19,144,965 tons; Cumberland, with 28 collieries, 1,255,644 tons; Yorkshire, with 397 collieries, 9,374,600 tons; Derbyshire and Nottinghamshire, with

180 collieries, 5,116,319 tons; Leicestershire, with 11 collieries, 740,000 tons; Warwickshire, with 16 collieries, 647,000 tons; Staffordshire and Worcestershire, with 580 collieries, 7,253,750 tons; Lancashire, with 373 collieries, 12,195,500 tons; Cheshire, with 39 collieries, 801,570 tons; Shropshire, with 66 collieries, 829,750 tons; Gloucestershire, Somersetshire, and Devonshire, with 112 collieries, 6,514,025 tons; Wales, with 398 collieries, 8,561,021 tons; Scotland, with 424 collieries, 11,081,000 tons; and Ireland, with 46 collieries, 123,070 tons. These returns show a large increase upon preceding years. Thus in 1854, with 2397 collieries worked, 64,661,401 tons of coal were raised; in 1855, with 2613 collieries, 64,453,079 tons; in 1856, with 2829 collieries, 66,645,450 tons; in 1857, with 2867 collieries, 65,394,707 tons; in 1858, with 2958 collieries, 65,008,649 tons; in 1859, with 2949 collieries, 71,979,765 tons; in 1860, with 3009 collieries, 84,042,698 tons; and last year, with 3052 collieries, 83,635,214 tons. Of this vast quantity, only 7,560,758 tons of coal, 286,150 tons of coke, and 79,717 tons of patent fuel, were exported, the remainder being absorbed at home. This enormous amount of mineral wealth was produced in the year 1861 by no less than 235,590 collieries.

Waste  
of coals.

In 1861 it is stated in Mr. Hunt's returns, that nearly two millions and a half tons of coals were burnt or wasted at the pits in Durham and Northumberland alone; and in 1862, he says, "the amount of the coals burnt or wasted at pits has been so differently represented, and appears so uncertain, that it is for the present omitted." Attention has since been directed to the rate at which the exhaustion of our coal-beds is going on, as it becomes a really important element to determine with all possible accuracy the extent to which this system of waste prevails on the surface and in the mine. In Derbyshire about one-sixth of the quantity of coal raised, which amounted last year to 4,534,800 tons, is left in the colliery, and this is not much in excess of the quantity of coals lost in working the collieries in other districts. In estimating, therefore, the rate

at which we are draining our coal-fields of their fossil fuel, we cannot take less than 90,000,000 tons as representing the annual rate of exhaustion.

Sir William Armstrong, at the last meeting of the British Association, which was held on the 26th August, 1863, expressed an opinion that although the entire quantity of coal throughout the universe might be considered as practically inexhaustible, the rate at which we are expending those seams of coal in the British isles, which yield the best quantity of fuel at the least expense, cannot be contemplated without anxiety. "The greatness of England," he said, "much depends upon the superiority of her coal in cheapness and quality over that of other nations; but we have already drawn from our choicest mines a far larger quantity of coal than has been raised in all other parts of the world put together, and the time is not remote when we shall have to encounter the disadvantages of increased cost of working and diminished value of produce. Estimates have been made as to the time which would be required to produce complete exhaustion of all the accessible coal in the British islands. These estimates are extremely discordant; but the discrepancies arise not from any important disagreement as to the available quantity of coal, but from the enormous difference in the rate of consumption, at the various dates when the estimates were made, and also from the different views which have been entertained as to the probable increase of consumption in future years. The quantity of coal worked from British mines has been almost trebled during the last twenty years, and has probably increased tenfold since the commencement of the present century; but as this increase has taken place pending the introduction of steam navigation and railway transit, and under exceptional conditions of manufacturing development, it would be too much to assume that it will continue to advance with equal rapidity. Assuming 4000 feet as the greatest depth at which it will ever be possible to carry on mining operations, and rejecting all seams of less than two feet in thickness, the entire quantity of available coal existing in these islands has been calculated to amount

Exhaustion of coal-beds.



to about 80,000 millions of tons, which at the present rate of consumption would be exhausted in 930 years; but with a continued yearly increase of  $2\frac{3}{4}$  millions of tons, it would only last 212 years. It is clear that long before complete exhaustion takes place, England will have ceased to be a coal-producing country on an extensive scale compared with other nations, especially the United States of America, which possess coal-fields thirty-seven times more extensive than ours. The question is, not how long our coal will endure before absolute exhaustion is effected, but how long will those particular coal-seams last, which yield coal of a quantity and at a price to enable this country to maintain her present supremacy in manufacturing industry. So far as this particular district (Newcastle-on-Tyne) is concerned, it is generally admitted that 200 years will be sufficient to exhaust the principal seams, even at the present rate of working. If the production should continue to increase as it is now doing, the duration of those seams will not reach half that period. How the case may stand in other coal-mining districts I have not the means of ascertaining; but, as the best and most accessible coal will always be worked in preference to any other, I fear the same rapid exhaustion of our most valuable seams is everywhere taking place." These views of Sir William Armstrong may be taken to be substantially correct; it is, therefore, of the greatest importance that the amount of waste now going on in the coal-fields should be ascertained and prevented.

## Copper.

The number of copper mines worked in 1862 was 230; of these, 201 are in Cornwall and Devonshire. For several years there has been a steady decline in the rate at which copper has been produced from our mines; the relative produce of the last three years being as follows:

	Ore.	Fine copper.
	Tons.	Tons.
1860 . . . . .	236,696	15,968
1861 . . . . .	231,487	15,331
1862 . . . . .	224,171	14,843

## Iron.

The quantity of iron ore raised in 1862-3 is a slight

increase upon the preceding year. The number of blast furnaces was 562.

The lead produced from our mines also shows a slight <sup>Lead.</sup> increase: The number of lead mines worked in Cornwall in 1861 was 44; in Devonshire, 11; in Cumberland, 79; in Northumberland and Durham, 39; in Westmoreland, 6; in Cheshire, 1; in Shropshire, 9; in Yorkshire, 30; in Somersetshire, 4; and in Staffordshire, 1; making a total for England of 224. As regards Wales, the county of Cardigan had 43 lead mines at work in 1861; Carmarthen-shire, 3; Denbighshire, 14; Flintshire, 48; Montgomeryshire, 14; Merionethshire, 3; Pembrokeshire, 1; Radnorshire, 2; Carnarvonshire, 19; making a total for the principality of 147. The Isle of Man, at the same time, had 5 lead mines worked; Scotland, 7; and Ireland, 7; making a total for the United Kingdom of 390, as compared with 380, in 1860, and 264 in 1859. The quantity of ore raised does not show a corresponding increase, having been—for England, 59,503 tons in 1861, against 59,352 tons in 1860, and 63,753 tons in 1859; Wales, 24,219 tons in 1861, against 22,177 tons in 1860, and 20,656 tons in 1859; for the Isle of Man, 2717 tons in 1861, against 2810 tons in 1860, and 2464 tons in 1859; for Scotland, 1760 tons in 1861, against 1973 tons in 1860, and 1946 tons in 1859; for Ireland, 2403 tons in 1861, against 2392 tons in 1860, and 2457 tons in 1859; making a total (including sundries) of 90,657 tons in 1861, against 88,744 tons in 1860, and 91,381 tons in 1859. The quantity of metallic lead produced from this aggregate of ore was 65,634 tons in 1861, against 63,317 tons in 1860, and 63,233 tons in 1859, the estimated value being £1,445,255 in 1861, £1,412,760 in 1860, and £1,410,095 in 1859.

The decline of copper has been succeeded by an in- <sup>Tin.</sup>crease of tin. The tin ore (black tin) smelted during 1862 amounted to 14,127 tons, being an increase of upwards of 1000 tons upon the preceding year, and the largest quantity which has ever been produced in any one year, although there is reason to suppose that the yield of the present year will be still larger. For the future we

can hardly venture an opinion, but it is a curious fact that some of the richest copper mines in Cornwall are now yielding large quantities of tin, and an inference has been drawn from the present appearance of the mines, that copper is fast giving place to tin; at any rate, a large increase of tin may be expected in future years; so that whether copper be gradually reduced in quantity or not, the yield of tin is decidedly on the increase. This is very encouraging, when it is remembered that, for more than 2000 years (*a*), the counties of Cornwall and Devon have yielded this valuable ore.

(*a*) Post, p. 72.



## CHAPTER II.

## PROPERTY IN MINES, MINERALS, AND QUARRIES, UNDER THE ROMAN EMPIRE.

*The Civil Law in different States, and under Tiberius, Gratian, Valentinian, Theodosius Maximus, and other Emperors. The Civil Law the Basis of European Laws. Theory of the Law in the Middle Ages, and subsequent Periods. Practical Adjustment of the Rights of the State and Private Rights.*

UNDER the Roman Empire, all mines, minerals, and quarries, and indeed the soil itself, belonged to the State by right of conquest. In some of the provinces, on the allotment of the land to private individuals, the conquerors reserved the right to the mines, minerals and quarries, for the benefit of the State; in other provinces mineral rights were assigned to the allottees of the soil. Hence the property in minerals became, not unfrequently, distinct from the property in the soil. Civil law.

But there was no universal law, and variations were made in the laws of different provinces by successive emperors, as well for State purposes as for the advantage of private persons. Tiberius appears to have claimed absolute dominion over all mines and minerals whatever, but this encroachment on the rights of private persons was abandoned by his successors, who only demanded a royalty. "Potestas enim indagandi metalla etiam privatis erat, antequam illis eandem ademerat Tiberius. Restituerunt deinde iisdem hoc beneficium sequentes Principes, sed eâ lege, ut certum inde canonem metallicum solverent" (a).

Gratian gave a general permission to take minerals from the lands of private persons on paying one-tenth to the State, and another tenth to the owner: "Cuncti qui per privatorum loca, saxorum venam laboriosis effossionibus

(a) Vide Heineccii, *Antiq. Rom. Syntag.*, App. lib. i. s. 112.

persequuntur, decimas fisco, decimas etiam domino repræsentent, cætero modo (propriis) suis desideriis vindicando" (b). This decree was adopted by Valentinian and Theodosius Maximus.

The Emperor Valentinian, in order to promote the discovery of gold, published a rescript which allowed the fiscal, or State mines, to be worked by private persons for their own advantage; the only conditions imposed being the payment of a certain proportion of the produce, by way of royalty, to the State, with a right of pre-emption by the State, when the gold found exceeded a certain quantity. The royalty was called *canon metallicus*, and was fixed by Valentinian, as well as by Theodosius Maximus, at *eight scruples in gold dust* (in balluca) for each *worker* in the mine. "*Perpensa deliberatione duximus Sanciendum, ut quicumque exercitium metallorum vellet affluere, is labore proprio, et sibi et reipublicæ commoda comparet. Itaque si qui sponte conduxerint, eos laudabilitas tua octonos scrupulos in balluca cogat exsolvere. Quidquid autem amplius colligere potuerint, fisco potissimum distrahant, à quo competentia ex largitionibus nostris pretia suscipiant*" (c).

Other provisions were made by subsequent emperors which were at variance with the general principles of the Roman law; but the interpretation put upon them by the Lombard glossographers made them applicable to all mines and metals, and to all times and most countries; and though it does not appear that they anywhere inculcated the doctrine of an absolute property in the crown, they certainly contributed to establish the principle that mines, under some of the emperors, even in private lands, were subject to certain public servitudes, and became a legitimate source of public revenue (d).

A learned author has thus expressed himself on the subject:

"Over the treasures concealed beneath the soil, the State claimed the same paramount dominion as over the produce

(b) Vide Justin. Cod. Civ., lib. xi. tit. 6. "De Metallariis." ing provision in the Theodosian Code, lib. x. tit. 19, 3.

(c) Vide Justin. Cod. Civ., lib. xi. tit. 6; de Metallariis and correspond- (d) Savigny's Roman Law, vol. iv. p. 268, ed. Heidelberg, 1826.

of its surface. The mines and quarries throughout Italy and the provinces were held in part by the Roman people, and farmed, like the land-tax, to private speculators; in part, conceded to private proprietors, with the reserve of a fixed rent for the privilege of working them. The former class consisted principally of such works as were already at the time of the Conquest either royal or public property. Thus it was found in Macedonia that the State had monopolised the gold and silver mines, and allowed its citizens to work those of iron and copper only, and accordingly the same distinction was maintained by the conquerors. The contractors paid largely for their bargains, and in return the State supplied them with the forced labour of condemned criminals. In some cases it employed in this ignominious service the reluctant hands of its legionary soldiers. Finally, it bound the population in the mining countries to the soil itself, and while it allowed them to profit by their industry, forbade them to desert the works, or migrate in search of other employment" (*e*). And another learned author says that, "By the civil law all veins and mineral deposits of gold, silver, and other precious stones belonged, if in public ground, to the sovereign, if in private ground, to the owner of the soil, subject to this condition in the latter case, that, if worked by the owner, he was bound to render a tenth part of the produce to the prince, as a right attaching to his crown; and if worked by any other person, by consent of the owner, the former was liable to the payment of two tenths, one tenth to the prince and the other tenth to the owner. Subsequently it became an established custom in most States, and was declared by the particular laws of each, that all veins of the precious metals and the produce thereof should vest in the crown absolutely, and be held to be part of the patrimony of the king or sovereign prince" (*f*).

The opinions of these learned authors, combined with the other authorities, lead to the conclusion that, under the civil law in its purest times, gold, silver, and other precious

(*e*) Merivale's Roman Empire, vol. iii. chap. ii. p. 543.

(*f*) Gamboa's Mining Ordinances in Spain, by Heathfield, vol. i. p. 15, ed. 1830.



metals usually belonged to the State, whilst all other minerals, mines, and quarries belonged to the owner of the soil, subject in some cases to a partial, and in others to a more general, control of the fiscus.

Civil law  
the basis  
of Euro-  
pean law.

Middle  
ages.

The civil law undoubtedly formed the basis of ancient legislation in the countries on the Continent, as will appear by a reference to the law which prevailed during the middle ages. Two theories of property in mines, it is said, appear to have been then in force (*g*). One regarded the sovereign as the absolute proprietor of all mines, and recognised no right in the landowner, except an indemnity for damage done to the surface in pursuit of them; the other admitted the owner of the surface to be also entitled to the mines beneath it, but gave to third persons the power, founded on notions of public utility, to acquire an interest in them when the owner was unable or unwilling to work them.

Subsequent  
periods.

Practical  
adjustment  
of rights.

As the enjoyment of the mines had in both cases been subject to regulations prescribed by the sovereign, who had also very commonly established a claim to a tenth or other proportion of the mineral produce, it is easy to perceive that the two theories might in practice have nearly coincided; and accordingly it has been, and still is, a disputed question in some countries whether metallic mines do in point of law belong to the sovereign or the subject, but in the present day the crown, in almost every State, is left in undisputed possession of the precious minerals, and in some of the States to all minerals whatever, whilst the subject is entitled to a concession from the government to search for the minerals upon the payment of a royalty and upon fulfilment of certain other prescribed terms and conditions; but the law is by no means uniform, and in England, Russia, and some of the Belgian provinces the subject enjoys even greater privileges than under the civil law, as will appear from the subsequent pages of this treatise.

(*g*) Smirke's Stannaries, Vice v. Thomas, App. 80.

## CHAPTER III.

THE LAW RELATING TO MINES, MINERALS, AND QUARRIES  
IN FOREIGN STATES, INCLUDING FRANCE, BELGIUM,  
GERMANY, PRUSSIA, AUSTRIA, SPAIN—MEXICO,  
ITALY, SARDINIA, PONTIFICAL STATES, RUSSIA, AME-  
RICA.

## SECTION I.

## FRANCE.

*Prerogative of the State—Differences of Opinion—Rights of the State and Proprietor of the Soil defined—Government Grants—Mines and Quarries—Union of Several Grants—Grants, whether Real or Personal Property—Code Napoléon—Legal Decisions—Laws of 1791, 1810, 1838, 1840, 1842, 1852, 1860—International Treaty, 1862, respecting Companies.*

FRANCE is one of the countries in which eminent authorities are divided as to the ancient property in mines. Merlin, whose elaborate argument on the mines of Hainaut contains a sketch of the history of the French Mines, cannot find in the various ordinances of the Kings of France any authority for supposing that they claimed a property in the mines themselves. Merlin supposes the Kings of France to reason thus: "L'intérêt publique exige a la fois que des propriétés aussi précieuses ne soient mises en valeur que sous l'inspection de l'autorité, et qu'elles ne demeurent pas inutiles. Vous ne toucherez a ces mines qu'après en avoir obtenu de nous la permission, et en nous payant telles redevances. Si vous n'exploitez pas, nous autoriserons d'autres a le faire" (a). On the other hand, it has been urged that the right, constantly exercised by the crown, to authorize the entry of third persons into private lands, to regulate and superintend the working of mines, and to demand a tenth of the produce, is hardly distinguishable

Ancient prerogative of the State.

Differences of opinion.

(a) Questions de Droit, tit. Mines, tom. x. s. 4; vide Loisel. Institut. Coutum., 1 vol. 282.

from a right of property. "Les rois se contenteront de protéger les ouvriers, à qui ils avaient abandonné les mines à la charge d'une redevance du dixième du produit. L'exploitation moyennant cette condition et celle de dédommager les propriétaires des terrains, était libre à tous les mineurs" (*b*).

Certain it is, that either the crown, or its representatives (the feudatoris and seigneurs haut-justiciers), had very generally adopted and appropriated the theory of a royalty in mines when Charles VI., and Louis XI. in the fifteenth century, resumed the rights of the monarchy, and promulgated a system for the government of the mines evidently founded on the practice of Germany (*c*). Exemption from certain taxes and servitudes; special protection of person and property; local and peculiar jurisdiction; rights of way and water; supply of fuel and timber; general liberty of search in all uncultivated places; and a right to work mines whenever the owner, after distinct notice, delayed for three months to work them himself—are the prominent features of these edicts; and, with some modifications in later reigns, they formed the groundwork of the general law of France, in the absence of local customs, until the law of 28th of July, 1791, amended by the law of 21st of April, 1810, declared that the mineral wealth of France, below the depth of one hundred feet, was the property of the nation, to be disposed of by the government in the general interest of the public, and unfettered by any claim from the owner of the soil (*d*).

Rights of  
the State  
and the  
proprietor  
defined.

Laws,  
1810.

Govern-  
ment  
grants.

The law of April 21, 1810, divides mineral substances into three classes (*e*), mines, minerals, quarries (*f*), and it declares (*g*) the property in mines to be distinct from the property in the soil, which cannot be explored without a concession from the government (*h*). The government has a sovereign right to grant the concession to whomsoever it

(*b*) Regnault d'Epercy, Report on the Law of 1791. See also Heron de Villefosse, Richesse de Minérale de la France, vol. i.

(*c*) Loisel. Inst. Cout., 1 vol. 280.

(*d*) Vide L'Art. II. de la Loi du 21 Avril 1810.

(*e*) Tit. 1<sup>er</sup>, Art. 1, 2, 3, 4.

(*f*) De la Propriété des Mines, par Dalloz, edit. 1862, tom. 1<sup>re</sup>, p. 94.

(*g*) Jurisprudence des Mines, par Dupont. Paris, 1862.

(*h*) Art. 5, 7, 19. Vide Laws, App. p. 39. Des Codes Français, par Royer-Collard.



pleases—foreigners as well as citizens (*i*)—and acknowledges no right of preference in the owner of the soil or the first discoverer of the minerals, but the first discoverer has, nevertheless, a claim upon the consideration and good will (*bienveillance*) of the government. The concession is granted, subject to the payment of a double tribute, that is to say, a redevance of ten francs per square kilometre, and a proportional redevance, limited to a twentieth of the net produce, and a “*décime pour franc*” (*j*). But although the mineral substances which are considered as <sup>Mines.</sup> mines cannot be explored even by the proprietor of the soil except under a concession from the government, quarries can be worked by the proprietor without any such <sup>Quarries.</sup> permission, subject to certain regulations and restrictions prescribed by the State (*k*).

Mines obtained by virtue of a concession may be let on lease like other property, provided the term does not exceed that of the original grant. They may also be sold, but cannot be divided or sold in lots without the sanction of the government; and they descend to the heirs of the legal owner. Numerous decisions on these various characteristics of property in mines have been pronounced in the French courts of law, as will appear by reference to a recent work on the subject (*l*).

By the law of 1810 the union of several concessions was prohibited without the previous sanction of the government, and on the 23rd October, 1852, this prohibition was re-enacted, and it was declared that all such reunions were absolutely null and void, and worked a forfeiture of the concessions; without prejudice, however, to the criminal proceedings which the concessionnaires of the united mines might render themselves liable to, under and by virtue of the 414 and 419 articles of the penal code (*m*). <sup>Union of several grants.</sup>

The proprietor of a concession seems to be regarded

(*i*) Tit. 3, sec. 2.

(*j*) Art. 33, 34, 35, 36 de la Loi de 10 Avril, 1810, v. aussi l'art. 57 du décr. 6 Mai, 1811; et l'art. 1, ord. 19, Oct. 1828.

(*k*) Art. 83.

(*l*) De la Propriété des Mines, par Dalloz, edit. 1862, tom. 1<sup>er</sup>, pp. 134, 139, 254, 272.

(*m*) Vide La Circul. Minst. du 20 Nov. 1852. Recueil gén. des Lois, vol. 1861, part i. p. 113.

Grants,  
real or  
personal  
property.

rather as a purchaser of the minerals which he may extract during his tenancy, than as having any particular interest in the soil; the consequence is, that he has to pay for the minerals extracted, as for moveables, according to the 69th article of the law of the seventh year of the republic, and not for immoveables as fixed by the same law; and by a decree of the Court at Lyons on June 29, 1853, it was held that a contract of letting for a fixed number of years for a certain sum payable at fixed periods was subject to both laws (n).

Code Na-  
poléon.

The Code Napoléon, which was promulgated between the passing of the laws of 1791 and 1810, has not introduced any new law respecting the right of property in mines. Article 552 of that code recognises the principle that the owner of the soil is entitled to everything above and below it; but the same article contains the important provision that the proprietor of the soil may make all such excavations below the surface as he may elect, subject to the restrictions imposed by the laws and regulations relating to mines. The laws and regulations referred to in the code must include the prohibition imposed on the proprietor of the soil against exploring the ground below the depth of one hundred feet from the surface, but the effect of the above-mentioned articles of the Code Napoléon, combined with the laws of 1791 and 1810 on mineral rights, has given rise to some discussion.

Legal de-  
cision.

By a decision of February 1st, 1841, it was decreed that when no concession has been granted by the government, the 552 Art. of the Code Napoléon vests the property in minerals in the owner of the surface, and a stranger could not deprive the owner of the soil of his rights without paying the compensation required by the government surveyors (o). The same article in the Code Napoléon has been construed, in conjunction with Articles 10 and 12 of the law of 1810, to imply a right in the owner of the soil to make excavations without permission of the govern-

(n) Vide Aff. de Castellane (D. P. 44, 1, 258, 17 Janv. 1844; Aff. Mac-carthy, D. P. 53, 2, 351).

(o) Vide Jurisp. Gén., 2nd edit. Mines, No. 55; Code Civil, Art. 552.

ment, for the purpose of ascertaining whether minerals exist (*p*).

Customary rights in mines are regulated by the code (*q*).

By a law of April 27, 1838, the government is empowered to require the proprietors of a mine to prevent inundations (*r*). A law of June 7, 1840, has brought mines of salt, which was omitted in the law of 1810, within the laws of mines, and decrees have since been passed in reference to those mines (*s*). An ordinance of April 18, 1842, requires that every concessionnaire of a mine should select a settled place of business, which he was to make known to the préfet of the department where the mines were situated (*t*); and on June 30, 1860, a decree, intended to favour the increase of dues payable in respect of mines, has declared that those dues are from that period to be ascertained by a calculation of the net average profits of the two preceding years. These, and some few others of minor importance, are, in conjunction with the laws of 1791 and 1810, the decrees, and regulations concerning mineral property in France, but inasmuch as the laws of 1791 and 1810 form the basis of the legislation on mines in the chief states of Europe, the principal articles of those laws are introduced in this place.

“*Tit. 1.—Des mines en général* (*u*).

Laws of  
1791.

Art. 1. Les mines et minières, tant métalliques que non métalliques, ainsi que les bitumes, charbons de terres ou de pierre et pyrites, sont à la disposition de la nation, en ce sens seulement que ces substances ne pourront être exploitées que de son consentement et sous sa surveillance à la charge d'indemniser, d'après les règles qui seront prescrites, les propriétaires de la surface, qui jouiront en outre de celle de ces mines qui pourront être exploitées, ou à tranchées

When go-  
vernment  
grant is  
necessary.

(*p*) Belg. Judic. 1849; Pasier, 1850, 1, 7.

(*q*) Vide Code Civil, 625th and following articles.

(*r*) Annales des Mines, 3<sup>e</sup> série, t. xiv, art. 1-5, p. 557.

(*s*) Jurisprudence des Mines, par Dupont, p. 62.

(*t*) Annales des Mines, 4<sup>e</sup> série, t. i. p. 812.

(*u*) Repertoire de Jurisprudence, par Merlin, tom. xx. p. 1858; La Nouvelle Législation, Favard, tom. iii. p. 541; Des Mines, Dalloz, edit. 1862, tom. 1<sup>re</sup>.



ouvertes, au avec fosse et lumière, jusqu'à cent pieds de profondeur seulement.

Art. 2. Il n'est rien innové à l'extraction de sables, craies, argiles, marnes, pierres à bâtir, marbres, ardoises, pierres à chaux et à plâtres, tourbes, terres vitrioliques, ni de celles connues sous le nom de cendres, et généralement de toutes substances, autres que celles exprimées dans l'article précédent, qui continueront d'être exploitées par les propriétaires, sans qu'il soit nécessaire d'obtenir aucune permission. Mais, à défaut d'exploitation, de la part des propriétaires, des objets énoncés ci-dessus, et dans le cas seulement de nécessité pour les grandes routes ou pour des travaux d'une utilité publique, tels que ponts, chaussées, canaux de navigation, monumens publics, et tous autres établissemens et manufactures d'utilité générale, les dites substances pourront être exploitées, d'après la permission du directoire du département (aujourd'hui, du préfet), donnée sur l'avis du directoire du district (aujourd'hui, du sous-préfet), par tous entrepreneurs ou propriétaires des dites manufactures, en indemnisant le propriétaire, tant du dommage fait à la surface, que de la valeur des matières extraites, le tout de gré à gré ou à dire d'experts.

Preference  
proprietors of soil.

Art. 3. Les propriétaires de la surface auront toujours la préférence, et la liberté d'exploiter les mines qui pourraient se trouver dans leurs fonds; et la permission ne pourra leur en être refusée, lorsqu'ils la demanderont (*v*).

Terms of  
and regulations  
respecting  
grants.

Art. 4. Les concessionnaires actuels ou leurs cessionnaires, qui ont découvert les mines qu'ils exploitent, seront maintenus (*w*) jusqu'au terme de leur concession, qui ne pourra excéder cinquante années, à compter du jour de la publication du présent décret.

En conséquence, les propriétaires de la surface, sous prétexte d'aucune des dispositions contenues aux articles premier et second, ne pourront troubler les concessionnaires actuels dans la jouissance de concessions, lesquelles subsisteront dans toute leur étendue, si elles n'excèdent pas celle qui sera fixée par l'article suivant; et dans le cas où elles

(*v*) Vide Art. 16 de la Loi 1810, post, p. 35.

(*w*) Recueil de Questions de Droit, par Merlin, tit. Mines, § 2.

excéderaient cette étendue, elles y seront réduites par les directoires des départemens, en retranchant, sur la désignation des concessionnaires, les parties les moins essentielles aux exploitations.

Art. 5. L'étendue de chaque concession sera réglée suivant les localités et la nature des mines, par les départemens sur l'avis des directoires de district; mais elle ne pourra excéder six lienes carrées; la liene qui servira de mesure sera celle de vingt-cinq au degré, de deux mille deux cent quatre-vingt-deux toises.

Art. 6. Les concessionnaires dont la concession à en pour objet des mines découvertes et exploitées par des propriétaires, seront déchus de leurs concessions, à moins qu'il n'y ait eu, de la part desdits propriétaires, consentement libre, légal et par écrit, formellement confirmatif de la concession; sans quoi, lesdites mines retourneront aux propriétaires qui les exploitaient avant lesdites concessions, à la charge par ces derniers de rembourser de gré à gré, ou à dire d'experts, aux concessionnaires actuels, la valeur des ouvrages et travaux dont ils profiteront. Quand le concessionnaire aura rétrocédé au propriétaire, le propriétaire ne sera tenu envers le concessionnaire, qu'au remboursement des travaux faits par le concessionnaire, desquels le propriétaire pourra profiter.

Art. 7. Les prorogations de concessions seront maintenues pour le terme fixé par l'art. 4 on annulées, selon que les mines qui en sont l'objet, se trouveront de la nature de celles mentionnées aux art. 4 et 6 du présent décret.

Art. 8. Toute concession au permission d'exploiter une mine, sera accordée par le département, sur l'avis du directoire du district, dans l'étendue duquel elle se trouvera située; et ladite permission ou concession ne sera exécutée qu'après avoir été approuvée par le Roi (aujourd'hui l'Empereur), conformément à Part 5, de la sect. 3 du décret du 22 décembre 1789 sur les assemblées administratives.

Art. 9. Tous demandeurs en concession (x) ou en permission seront tenus de justifier de leurs facultés, des moyens qu'ils emploieront pour assurer l'exploitation, et de

Acts necessary to be done before grant is made.

(x) Articles de la Loi 1810, post, pp. 34, 36.

quels combustibles ils prétendront se servir, lorsqu'il s'agira d'exploitation d'une mine métallique.

Art. 10. Nulle concession ne pourra être accordée qu'au paravant le propriétaire de la surface n'ait été requis de s'expliquer, dans le délai de six mois, s'il entend ou non procéder à l'exploitation, aux mêmes clauses et conditions imposées aux concessionnaires. Cette réquisition sera faite à la diligence du procureur-syndic du département où se trouvera la mine à exploiter.

Dans le cas d'acceptation par le propriétaire de la surface, il aura la préférence, pourvu toutefois que sa propriété seule, au réunie à celle de ses associés, soit d'une étendue propre à former une exploitation. Aurent également la préférence sur tous autres, excepté les propriétaires, les entrepreneurs qui auront découvert des mines, en vertu de permission à eux accordées par l'ancienne administration, en se conformant aux dispositions contenues au présent décret.

Art. 11. Toutes demandes en concessions ou permissions, qui seront faites par la suite, seront affichées dans le chef-lieu du département, proclamées et affichées dans le lieu du domicile du demandeur, ainsi que dans les municipalités que cette demande pourra intéresser; et les dites affichées et proclamations tiendront lieu d'interpellation à tous les propriétaires (y).

Art. 12. Lorsque les concessions ou permissions auront été accordées, elles seront de même rendues publiques par

(y) Cet article et les précédents ont été modifiés en ces termes, par la loi du 13 pluviôse, an 9 :

Art. 1. A l'avenir, lorsqu'une demande en concession de mines sera présentée au préfet du département, il pourra l'accorder deux mois après la réquisition faite au propriétaire de la surface, de s'expliquer s'il entend ou non procéder à l'exploitation, aux mêmes clauses et conditions imposées aux concessionnaires. Cette réquisition sera faite à la diligence du préfet de département.

Art. 2. A cet effet, toutes demandes en concession seront publiées et affichées dans le chef-lieu du département, dans celui de l'arrondissement,

dans le lieu du domicile du demandeur, et dans toutes les communes que la demande pourra intéresser.

Art. 3. Les publications auront lieu devant la porte de la maison commune, un jour de decadi; elles seront, ainsi que l'affiche, répétées trois fois aux lieux indigués, de decade en decade, dans le cours du mois qui suivra immédiatement la demande.

Art. 4. Le préfet ne prononcera sur la demand en concession qu'un mois après les dernières affiches et publications.

Art. 5. Il est dérogé, quant aux dispositions cidessus, aux art. 10 et 11, du tit. 1<sup>er</sup> de la loi du 12-28 juillet 1791.



affiches et proclamations, à la diligence du procureur-syndic du département.

Art. 13. Les limites de chaque concession accordée seront tracés sur un carte ou plan levé aux frais du concessionnaire, et il en sera déposé deux exemplaires aux archives du département.

Art. 14. Tout concessionnaire sera tenu de commencer son exploitation au plus tard six mois après qu'il aura obtenu la concession; passé lequel temps, elle sera regardée comme non avenue et pourra être faite à un autre, à moins que ce retard n'ait une cause légitime vérifiée par le directoire du district, et approuvée par celui du département.

Art. 15. Une concession sera annulée par une cessation de travaux pendant un an, à moins que cette cessation n'ait eu des causes légitimes, et ne soit approuvée par le directoire du département, sur l'avis du directoire du district, auquel le concessionnaire sera tenu d'en justifier. Il en sera de même des anciennes concessions maintenues dont l'exploitation n'aura pas été suivie pendant un an sans cause légitime, légalement constatée.

Art. 16. Pourront les concessionnaires renoncer à la concession qui leur aura été faite, en donnant, trois mois d'avance, avis de cette renonciation au directoire du département.

Art. 17. A la fin de chaque concession, ou dans le cas d'abandon, le concessionnaire ne pourra détériorer ses travaux; en conséquence, il ne pourra vendre que les minéraux extraits, les machines, bâtimens et matériaux existans sur l'exploitation, mais jamais enlever des échelles, étais, charpentes au matériaux nécessaires à la visite et à l'existence des travaux intérieurs de la mine, dont alors il sera fait un état double qui sera déposé aux archives du département.

Art. 18. S'il se présente de nouveaux demandeurs en concession ou permission pour continuer l'exploitation d'une mine abandonnée, ils seront tenus de rembourser aux anciens concessionnaires la valeur des échelles, étais, charpentes, matériaux, et de toutes machines qui auront été reconnues

nécessaires pour l'exploitation de la mine, suivant l'estimation qui sera faite de gré à gré, sinon par experts, gens de l'art, qui auront été choisis par les parties, ou nommés d'office.

Term of  
grant.

Art. 19. Le droit d'exploiter une mine accordée pour cinquante ans ou moins, expirant, les mêmes entrepreneurs qui auront fait exploiter par eux-mêmes ou par ouvriers à forfait, seront, sur leur demande, admis de préférence à tous autres, excepté cependant les propriétaires qui seront dans le cas prévu par l'art. 10, au renouvellement de la concession, pourvu, toutefois, qu'il soit reconnu que lesdits concessionnaires ont bien fait valoir l'intérêt public qui leur était confié ; ce qui aura lieu tant pour les anciennes concessions maintenues, que pour les nouvelles.

Compensation to  
proprietors of the  
soil.

Art. 20. Les concessionnaires actuels, au leurs cessionnaires, qui ont découvert les mines qu'ils exploitent et qui sont maintenus aux termes de l'art. 4, ainsi que ceux qui le seront conformément à l'art. 6, seront obligés d'indemniser les propriétaires de la surface, si fait n'a été, et ce dans le délai de six mois, à compter de la publication du présent décret.

Art. 21. L'indemnité dont il vient d'être parlé, ainsi que celle mentionnée dans l'article premier du présent décret, s'entend seulement des non-jouissances et dégâts occasionés dans les propriétés par l'exploitation des mines, tant à raison des chemins que des lavoirs, fuites des eaux, et tout autre établissement, de quelque nature qu'il soit, dépendant de l'exploitation, sans cependant que ladite indemnité puisse avoir lieu lorsque les eaux seront parvenues aux ruisseaux, fleuves et rivières.

Art. 22. Cette indemnité aura pour base le double de la valeur intrinsèque de la surface du sol qui sera l'objet desdits dégâts et non-jouissances. L'estimation en sera faite de gré à gré ou à dire d'experts ; si mieux n'aiment les propriétaires recevoir en entier le prix de leur propriété, dans le cas où elle n'excéderait pas dix arpens, mesure de Paris, et ce, sur l'estimation qui en sera faite à l'amiable ou à dire d'experts.

Art. 23. Les concessionnaires ne pourront ouvrir leurs

fouilles dans les enclos murés, ni dans les cours, jardins, près, vergers et vignes attenans aux habitations dans la distance de 200 toises, que du consentement des propriétaires de ces fonds, qui ne pourront dans aucun cas être forcés à le donner.

Art. 24. Les concessionnaires demeureront civilement responsables des dégâts, dommages et désordres occasionés par leurs ouvriers, conducteurs, et employés.

Art. 25. Lorsqu'il sera nécessaire à une exploitation d'ouvrir des travaux de secours dans un canton ou exploitation du voisinage, l'entrepreneur en demandera la permission au directoire du département, pourvu que ce ne soit pas pour extraire des minéraux provenans de ce nouveau canton, mais pour y étendre des travaux nécessaires, tels que galerie d'écoulement, chemins, prises d'eau, ou passage des eaux, et autres de ce genre, à la charge de ne point gêner les exploitations y existantes, et d'indemniser les propriétaires de la surface.

Art. 26. Seront tenus les anciens concessionnaires maintenus, et cens qui obtiendront à l'avenir des concessions au permissions, savoir, les premiers dans six mois pour tout délai, à compter du jour de la publication du présent décret, et les derniers dans les trois premiers mois de l'année qui suivra celle où leur exploitation aura commencé, de remettre aux archives de leur département respectif, un état double détaillé et certifié véritable, contenant la désignation des lieux où sont situées les mines qu'ils font exploiter, la nature de la mine, le nombre d'ouvriers qu'ils emploient à l'exploitation, les quantités de matières extraites; et si ce sont des charbons de terre, ce qu'ils en font tirer par mois; ensemble les lieux où s'en fait la principale consommation, et le prix desdits charbons; et de continuer à faire ladite remise avant le premier décembre de chaque année; et de joindre audit état un plan des ouvrages existans et des travaux fait dans l'année.

Art. 27. Toutes contestations relatives aux mines, demandées en règlement d'indemnité, et toutes autres sur l'exécution du présent décret, seront portées pardevant les juges de paix au les tribunaux de district, suivant l'ordre de



compétence et d'après les formalités prescrites par les décrets sur l'ordre judiciaire."

Iron mines. On a vu plus haut, que, par l'art. dernier de la loi du 12-28 juillet 1791, les tribunaux ordinaires étaient investis du droit de juger toutes contestations relatives aux mines. Mais cette disposition ne devait pas être entendue trop littéralement; et c'était, par exemple, une grande erreur d'en conclure que, s'il s'était élevé des réclamations de la part des propriétaires voisins d'une mine de fer, contre l'établissement d'un lavoir ou patouillet, pour l'exploitation, autorisée par le gouvernement de cette mine, les tribunaux eussent été compétens pour statuer sur ces réclamations (z).

Le droit accordé aux propriétaires par l'art. 1 du tit. 1 de la loi de 1791, d'exploiter à tranchée ouverte, ou avec fosse et lumière jusqu'à cent pieds de profondeur, les mines qui se trouveront dans l'étendue de leurs propriétés, devant être subordonné à l'utilité générale, ne pourra s'exercer pour les mines de fer que sous les modifications contenues sous tit. 2 de la même loi de 1791 (a).

Laws of  
1810.

La loi du 21 avril 1810 a établi sur les mines, des règles presque entièrement nouvelles. Voici comme elle est conçue :

"*Tit. 1. Des mines, minières et carrières.*

Art. 1. Les masses de substances minérales ou fossiles renfermées dans le sein de la terre, ou existantes à la surface, sont classées, relativement aux règles de l'exploitation de chacune d'elles, sous les trois qualifications de mines, minières et carrières.

Mines.

Art. 2. Seront considérées comme mines celle connues pour contenir en filons, en couches, ou en amas, de l'or, de l'argent, du platine, du mercure, du plomb, du fer en filons ou couches, du cuivre, de l'étain, du zinc, de la calamine, du bismuth, du cobalt, de l'arsenic, du manganèse, de l'antimoine, du molybdène, de la plombagine ou autres matières métalliques, du soufre, du charbon de terre ou de pierre, du bois

(z) Tit. 4. Merlin, Répertoire de Jurisprudence, tom. xx. p. 163.

(a) Tit. 2, Art. 1. Des Mines de Fer. Merlin, tom. xx. p. 161.

fossile, des bitumes, de l'alun, et des sulfates à base métallique.

Art. 3. Les minières comprennent les minerais de fer Minerals.  
dits d'alluvion, les terres pyriteuses propres à être converties en sulfate de fer, les terres alumineuses et les tourbes.

Art. 4. Les carrières renfermant les ardoises, les grès, Quarries.  
pierres à bâtir et autres, les marbres, granits, pierres à chaux, pierres à plâtre, les pouzzolanes, le trass, les basaltes, les laves, les marnes, craies, sables, pierres à fusil, argiles, kaolin, terres à foulon, terres à poterie, les substances terreuses et les cailloux de toute nature, les terres pyriteuses regardées comme engrais, le tout exploité à ciel ouvert ou avec des galeries souterraines.

*Tit. 2. De la propriété des mines.*

Art. 5. Les mines ne peuvent être exploitées qu'en vertu d'un acte de concession délibéré en conseil d'état. Government grant.

Art. 6. Cet acte règle le droit des propriétaires de la surface sur le produit des mines concédées.

Art. 7. Il donne la propriété perpétuelle de la mine, laquelle est, dès lors, disponible et transmissible comme tous les autres biens, et dont on ne peut être exproprié que dans les cas et selon les formes prescrits pour les autres propriétés, conformément au code civil et au code de procédure civile. Toute-fois une mine ne peut être vendue par lots ou partagée, sans une autorisation préalable du gouvernement, donnée dans les mêmes formes que la concession.

Art. 8. Les mines sont immeubles.

Sont aussi immeubles, les bâtimens, machines, puits, galeries et autres travaux établis à demeure, conformément à l'art. 524 du code civil.

Sont aussi immeubles, par destination, les chevaux, agrès outils et ustensiles servant à l'exploitation.

Ne sont considérés comme chevaux attachés à l'exploitation que ceux qui sont exclusivement attachés aux travaux intérieurs des mines.

Néanmoins, les actions ou intérêts dans une société ou entreprise pour l'exploitation des mines, seront réputés meubles, conformément à l'art. 526 du code civil.

Sont meubles, les matières extraites, les approvisionnement et autres objets mobiliers.

Acts necessary to be done before grant is made. *Tit. 3. Des actes qui précèdent la demande en concession des mines.*

Sect. 1. De la recherche et de la découverte des mines.

Art. 10. Nul ne peut faire des recherches pour découvrir des mines, enfoncer des sondes ou trarières sur un terrain que ne lui appartient pas, que du consentement du propriétaire de la surface, ou avec l'autorisation du gouvernement, donnée après avoir consulté l'administration des mines, à la charge d'une préalable indemnité envers le propriétaire et après qu'il aura été entendu.

Art. 11. Nulle permission de recherches ni concessions de mines ne pourra, sans le consentement formel du propriétaire de la surface, donner le droit de faire des sondes et d'ouvrir des puits ou galeries, ni celui d'établir des machines ou magasins dans les enclos murés, cours ou jardins, ni dans les terrains attenant aux habitations ou clôtures murées, dans la distance de cent mètres desdites clôtures ou des habitations.

Art. 12. Le propriétaire pourra faire des recherches, sans formalité préalable, dans les lieux réservés par le précédent article, comme dans les autres parties de sa propriété; mais il sera obligé d'obtenir une concession avant d'y établir une exploitation. Dans aucun cas, les recherches ne pourront être autorisées dans un terrain déjà concédé.

Grants to foreigners. Sect. 2. De la préférence à accorder aux concessions.

Art. 13. Tout Français ou tout étranger naturalisé ou non en France, agissant isolément ou en société, a le droit de demander et peut obtenir, s'il y a lieu, une concession de mines.

Art. 14. L'individu ou la société doit justifier des facultés nécessaires pour entreprendre et conduire les travaux, et des moyens de satisfaire aux redevances, indemnités qui lui seront imposées par l'acte de concession.

Art. 15. Il doit aussi, le cas arrivant de travaux à faire sous les maisons ou lieux d'habitation, sous d'autres exploitations ou dans leur voisinage immédiat, donner caution de payer toute indemnité, en cas d'accident: les demandes



ou oppositions des intéressés seront, en ce cas, partées devant nos tribunaux et cours.

Art. 16. Le gouvernement juge des motifs ou considérations d'après lesquels la préférence doit être accordée aux divers demandeurs en concession, qu'ils soient propriétaires de la surface, inventeurs ou autres.

En cas que l'inventeur n'obtienne pas la concession d'une mine, il aura droit à une indemnité de la part du concessionnaire ; elle sera réglée par l'acte de concession.

Art. 17. L'acte de concession fait après l'accomplissement des formalités prescrites, purge, en faveur du concessionnaire, tous les droits des propriétés de la surface et des inventeurs, et de leurs ayant droit, chacun dans leur ordre, après qu'ils ont été entendus ou appelés légalement (ainsi qu'il sera ci-après réglé). Rights of grantees.

Art. 18. La valeur des droits résultant en faveur du propriétaire de la surface, en vertu de l'art. 6 de la présente loi, demeurera réunie à la valeur de ladite surface, et sera affectée avec elle aux hypothèques prises par les créanciers du propriétaire.

Art. 19. Du moment où une mine sera concédée même ou propriétaire de la surface, cette propriété sera distinguée de celle de la surface, et désormais considérée comme propriété nouvelle, sur laquelle de nouvelles hypothèques pourront être assises, sans préjudice de celles qui auraient été ou seraient prises sur la surface et la redevance, comme il est dit à l'article précédent.

Si la concession est faite au propriétaire de la surface, ladite redevance sera évaluée pour l'exécution dudit article.

Art. 20. Une mine concédée pourra être affectée par privilège, en faveur de ceux qui, par acte public et sans fraude, justifieraient avoir fourni des fonds pour les recherches de la mine, ainsi que pour les travaux de construction ou confection de machines nécessaires à son exploitation, à la charge de se conformer aux art. 2103 et autres du code civil, relatifs aux privilèges.

Art. 21. Les autres droits de privilège et d'hypothèque pourront être acquis sur la propriété de la mine, aux termes et en conformité du code civil, comme sur les autres propriétés immobilières.

How to  
obtain a  
grant.

*Tit. 4. Des concessions.*

**Sect. 1. De l'obtention des concessions.**

**Art. 22.** La demande en concessions sera faite par voie de simple pétition adressée au préfet, qui sera tenu de la faire enregistrer à sa date sur un registre particulier, et d'ordonner les publications et affiches dans les dix jours.

**Art. 23.** Les affiches auront lieu pendant quatre mois, dans le chef-lieu du département, dans celui de l'arrondissement où la mine est située, dans le lieu du domicile du demandeur, et dans toute les communes dans le territoire desquelles la concession peut s'étendre : elles seront insérées dans les journaux de département.

**Art. 24.** Les publications des demandes en concession de mines, auront lieu devant la porte de la maison commune et des églises paroissiales et consistoriales, à la diligence des maires, à l'issue de l'office, un jour de dimanche, et au moins une fois par mois pendant la durée des affiches. Les maires seront tenus de certifier ces publications.

**Art. 25.** Le secrétaire général de la préfecture délivrera au requérant un extrait certifié de l'enregistrement de la demande en concession.

**Art. 26.** Les demandes en concurrence et les oppositions qui y seront formées, seront admises devant le préfet jusqu'au dernier jour du quatrième mois, à compter de la date de l'affiche : elles seront notifiées par actes extrajudiciaires à la préfecture du département, où elles seront enregistrées sur le registre indigé à l'art. 22. Les oppositions seront notifiées aux parties intéressées ; et le registre sera ouvert à tous ceux qui en demanderont communication.

**Art. 27.** A l'expiration du délai des affiches et publications, et sur la preuve de l'accomplissement des formalités portées aux articles précédens, dans le mois qui suivra, au plus tard, le préfet du département, sur l'avis de l'ingénieur des mines, et après avoir pris des informations sur les droits et les facultés des demandeurs, donnera son avis et le transmettra au ministre de l'intérieur.

**Art. 28.** Il sera définitivement statué sur la demande en concession par un décret délibéré en conseil d'état.

Jusqu'à l'émission du décret, toute opposition sera ad-

missible devant le ministre de l'intérieur ou le secrétaire général du conseil d'état : dans ce dernier cas, elle aura lieu par une requête signée et présentée par un avocat au conseil, comme il est pratiqué pour les affaires contentieuses ; et, dans tous les cas, elle sera notifiée aux parties intéressées. Si l'opposition est motivée sur la propriété de la mine acquise par concession ou autrement les parties seront renvoyées devant les tribunaux et cours (b).

Art. 29. L'étendue de la concession sera déterminée par l'acte de concession (c) : elle sera limitée par des points fixes, pris à la surface du sol, et passant par des plans verticaux menés de cette surface dans l'intérieur de la terre à une profondeur indéfinie, à moins que les circonstances et les localités ne nécessitent un autre mode de limitation.

Art. 30. Un plan régulier de la surface, en triple expédition, et sur une échelle de dix millimètres pour cent mètres sera annexé à la demande. Ce plan devra être dressé au vérifié par l'ingénieur des mines, et certifié par le préfet du département.

Art. 31. Plusieurs concessions pourront être réunies entre les mains du même concessionnaire, soit comme individu, soit comme représentant une compagnie, mais à la charge de tenir en activité l'exploitation de chaque concession.

Sect. 3. Des obligations des propriétaires de mines.

Royalties  
and taxes.

Art. 32. L'exploitation des mines n'est pas considérée comme au commerce, et n'est pas sujette à patente.

Art. 33. Les propriétaires de mines sont tenus de payer à l'état une redevance fixe, et une redevance proportionnée au produit de l'extraction.

(b) Cet article et les deux précédents n'étant plus dans toutes leurs parties, susceptibles d'une exécution littérale dans le royaume des Pays-Bas, depuis leur séparation d'avec la France, il a été pris, le 18 septembre 1818, pour les remettre en harmonie avec la forme actuelle de l'administration de ce royaume, un arrêté royal qui contient les dispositions suivantes. Vide Journal off. des Pays-Bas, tom. xiii. no. 35 ; Merlin, Répertoire de Jurisprudence, tom. xx. p. 169.

(c) La concession embrasse-t-elle toutes les substances minérales qui se trouvent sous le terrain qu'elle comprend, ou est-elle limitée à celles dont elle fait mention expresse ? Vide Pour le royaume des Pays-Bas, un arrêté royal, du 4 Mars 1824 :

Revu les instructions du 18 messidor an 9, et du 5 août 1810. . . . . Journal off. des Pays-Bas, tom. xix. no. 23.



Art. 34. La redevance fixe sera annuelle, et réglée d'après l'étendue de celle-ci : elle sera de dix francs par kilomètre carré. La redevance proportionnelle sera une contribution annuelle, à laquelle les mines seront assujéties sur leurs produits.

Art. 35. La redevance proportionnelle sera réglée à chaque année, par le budget de l'état, comme les autres contributions publiques : toutefois elle ne pourra jamais s'élever au-dessus de cinq pour cent du produit net. Il pourra être fait un abonnement pour ceux des propriétaires des mines qui le demanderont (*d*).

Art. 36. Il sera imposé en sus un décime pour franc, lequel formera un fonds de non valeur, à la disposition du ministre de l'intérieur, pour dégrèvement en faveur des propriétaires de mines qui éprouveront des pertes ou accidens.

Art. 37. La redevance proportionnelle sera imposée et perçue comme la contribution foncière.

Les réclamations à fin dégrèvement ou de rappel à l'égalité proportionnelle, seront jugées par les conseils de préfecture. Le dégrèvement sera de droit, quand l'exploitant justifiera que sa redevance excède cinq pour cent du produit net de son exploitation.

Art. 38. Le gouvernement accordera, s'il y a lieu, pour les exploitations qu'il en jugera susceptibles, et par un article de l'acte de concession, ou par un décret spécial délibéré en conseil d'état pour les mines déjà concédées, la remise en tout ou partie ou paiement de la redevance proportionnelle, pour le temps qui sera jugé convenable ; et ce, comme encouragement, en raison de la difficulté des travaux ; semblable remise pourra aussi être accordée comme dédommagement, en cas d'accident de force majeure qui surviendrait pendant l'exploitation.

Art. 39. Le produit de la redevance fixe et de la redevance proportionnelle formera un fonds spécial dont il sera, tenu un compte particulier un trésor public, et qui sera appliqué aux dépenses de l'administration des mines et à celles des recherches, ouvertures et mises en activité des mines nouvelles ou rétablissement des mines anciennes.

Art. 40. Les anciennes redevances dues à l'état soit en

(*d*) Recueil gén. des Lois, tom. 1860, part ii. pp. 107, 505.

vertu des lois, ordonnances au réglemens, soit d'après les conditions énoncées en l'acte de concession, soit d'après des baux et adjudications au profit de la régie du domaine, cesseront d'avoir cours à compter du jours où les redevances nouvelles seront établies.

Art. 41. Ne sont point comprises dans l'abrogation des anciennes redevances, celles dues à titre de rentes, droits et prestations quelconques, pour cession de fonds ou autres causes semblables, sans déroger toutefois à l'application des lois qui ont supprimé les droits féodaux.

Art. 42. Le droit attribue par l'art. 6 de la présente loi aux propriétaires de la surface, sera réglée à une somme déterminée par l'acte de concession.

Art. 43. Les propriétaires de mines sont tenus de payer les indemnités dues au propriétaire de la surface sur le terrain duquel ils établiront leurs travaux. Si les travaux entrepris par les exploitateurs ou par les propriétaires de mines ne sont que passagers, et si le sol où ils ont été fait peut être mis en culture au bout d'un an comme il l'était auparavant, l'indemnité sera réglée au double de ce qu'aurait produit net le terrain endommagé.

Art. 44. Lorsque l'occupation des terrains pour la recherche ou les travaux des mines, prive les propriétaires du sol de la jouissance du revenu au delà du temps d'une année, au lorsqu' après les travaux, les terrains ne sont plus propres à la culture, ou peut exiger des propriétaires des mines l'acquisition des terrains à l'usage de l'exploitation. Si le propriétaire de la surface le requiert, les pièces de terre trop endommagées et dégradées sur une trop grande partie de leur surface, devront être achetées en totalité par le propriétaire de la mine. L'évaluation du prix sera faite, quant au mode, suivant les règles établies par la loi du 16 septembre 1807, sur le dessèchement des marais, etc., tit. 11, mais le terrain à acquérir sera toujours estimé au double de la valeur qu'il avait avant l'exploitation de la mine (e).

Art. 45. Lorsque par l'effet du voisinage ou pour toute autre cause, les travaux d'exploitation d'une mine occasionnent des dommages à l'exploitation d'une autre mine, à

(e) Recueil gén. des Lois, to . 1861, part i, p. 959 ; part ii, p. 249.

raison des eaux pénètrent dans cette dernière en plus grande quantité ; lorsque, d'un autre côté, ces mêmes travaux produisent un effet contraire et tendent à évacuer tout ou partie des eaux d'une autre mine il y aura lieu à indemnité d'une mine en faveur de l'autre : le règlement s'en fera par experts.

Art. 46. Toutes les questions d'indemnités à payer par les propriétaires de mines, à raison des recherches ou travaux antérieurs à l'acte de concession, seront décidées conformément à l'art. 4 de la loi du 28 pluviose an 8.

Quarries.

Art. 81. L'exploitation des carrières à ciel ouvert a lieu sans permission, sous la simple surveillance de la police, et avec l'observation des lois ou réglemens généraux ou locaux.

Art. 82. Quand l'exploitation a lieu par galeries souterraines, elle est soumise à la surveillance de l'administration, comme il est dit au tit. 5" (*f*).

Inter-  
national  
Mining  
Companies.

By a convention between her Majesty and the Emperor of the French, relative to joint-stock companies, signed at Paris on April 30, 1862, it is provided as follows :

Art. 1. The high contracting parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorized in conformity with the laws in force in either of the two countries, the power of exercising all their rights, and of appearing before the tribunals, whether for the purpose of bringing an action, or for defending the same, throughout the dominions and possessions of the other power, subject to the sole condition of conforming to the laws of such dominions and possessions.

Art. 2. It is agreed that the stipulations of the preceding article shall apply as well to companies and associations constituted and authorized previously to the signature of the present convention, as to those which may subsequently be so constituted and authorized.

Art. 3. The present convention is concluded without limit as to duration. Either of the high powers shall,

(*f*) Merlin, Repertoire de Jurisprudence, tom. xx. p. 171.



however, be at liberty to terminate it by giving to the other a year's previous notice. The two high powers, moreover, reserve to themselves the power to introduce into the convention, by common consent, any modifications which experience may show to be desirable.

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## SECTION II.

### BELGIUM.

*Rights of the Sovereign—of the Proprietor of the Soil. The Principality of Liège—County of Limbourg—Hainaut. Laws of 1791, 1810, 1837, 1854-1860. Council of Mines. International Treaty, 1862, respecting Companies.*

THE Belgic provinces present some interesting variations from the general law of foreign mines. Thus, in the principality of Liège, and the county of Limbourg, the sovereign princes did not succeed in establishing a property in the mines, which have always been regarded as appurtenant to the ownership of the soil. Perhaps this exception to the practice of other countries may be accounted for from the fact that the most important mines, and those about which the legislation of those provinces has chiefly concerned itself, are coal mines. But, even here, it was not left to the absolute will of the proprietor to work them, or leave them unworked, as he pleased. When a mine was drowned and deserted, any private adventurer who would undertake to drain it, acquired a right to appropriate all the coal reclaimed at his cost upon payment of a fixed proportion of the raw product, under the name of *terrage*, to the landowner; and this right to the mineral was so strong, that it is a *vexata quæstio* whether the maker of the *arène* or sough did not become the owner of all the reclaimed coal (*g*). The formalities which preceded this right of *conquest*, as it was termed; the proclamation and notice to the party interested in opposing it; and the preference given to the landowner in case he wished to undertake the

(*g*) Delebecque, *Législation des Mines*, tom. i. p. 141.

work himself, are curious, and bear some resemblance to the regulations in force in the Stannaries of Cornwall since the reign of Henry VII.

This right, claimed by the miners of Liège as immemorial, was established or confirmed by an edict of Prince Ernest of Bavaria, and, with other ancient usages of the miners, was, from time to time, attested by the solemn declaration of the "Vair Jurés du Charbonnage," who constituted a court, as well for the supervision of the mines, as for the determination of litigated questions arising on them. It was also their remarkable privilege, or duty, to *record* the usages of miners upon the voluntary request or *quæritur* of any interested party. Their functions, however, had nearly fallen into disuse, when the introduction of the French code, consequent upon the Revolution, finally extinguished them.

Hainaut.

The seigneurs in the department of the Hainaut retain full rights to the coal, unfettered by any interference or claim on the part of the crown, but not to lead, copper, tin, or other minerals, and these rights were sanctioned by the law of July 16, 1817 (*h*); but, in that part of the province of Hainaut which was annexed to France in the seventeenth century, those ancient rights have been abolished (*i*).

Laws of  
1791 and  
1810.

In addition to coal, the mines of Belgium have produced (*j*) iron, zinc, lead, alum, and other inferior minerals, and recently copper has been found there (*k*). The laws relating to all these mines are to be found chiefly in the French legislation of July 28, 1791, and April 21, 1810, and in the new code of laws made by Belgium herself, May 2, 1837. None of those laws have affected the ancient prerogative of the crown, or the privileges of the proprietor of the soil in the principality of Liège, the county of Limbourg (*l*), or in the department of Hainaut.

(*h*) Jurisp. de la Cour de Bruxelles, 1817, t. ii. p. 257.

(*i*) See the French Laws of 1791, 1792, 1793.

(*j*) La Houillierie du Pays de Liège, par Henaux, chap. ii. p. 30.

(*k*) M. Lainé Fleury, Journ. des Econom.; livr. de févr. 1862.

(*l*) Jurisp. de la Cour de Bruxelles, 1817, t. ii. p. 257.

But the French laws of 1810, which classified mineral and fossil substances under the heads of mines, minerals, and quarries (*m*), must be chiefly consulted. As in France so in Belgium, mines cannot be explored except under a concession from the government; but quarries may be worked by the proprietor without obtaining any such permission. Government grant

The Belgian legislators have introduced important modifications of the French laws (*n*). The new code of May 2, 1837, is the most important, and treats chiefly of the tribunal of mines, of compensation to proprietors of the soil, the mode of obtaining concessions, working of, and regulations in reference to, mines. By Art. 11 of that code, a preference is given to the proprietor of the soil to have the first concession for exploring minerals situate under his own land (*o*); but two conditions are now attached to this preference (*p*), first, that the proprietor satisfies the "Conseil des Mines" that he possesses the necessary pecuniary funds for exploring the mines and carrying on the undertaking; the other, that the land can be profitably worked. Laws of 1837.

And again, in order to encourage the formation of mining companies in Belgium, the law has given a right of preference to companies, provided they give the same guarantees as are required from the proprietor of the soil; and by another decree, dated May 24, 1854 (*q*), the above-mentioned law is expounded and in some respects modified. Subsequent decrees and orders up to a very recent period have been adopted, but none of them affect the rights of the subject, or the prerogative of the crown, as previously established; but are directed chiefly to the management and regulation of mines. By a royal decree of May 25, 1860, the laws relating to inspectors of mines were amended. Laws of 1854 to 1860.

(*m*) Ante, p. 32.

(*n*) Jurisprudence du Conseil des Mines, Bruxelles, 1850; Nouveau Code des Mines avec Supplément, par Chicora et Dupont, Bruxelles, 1846, 1852; Commentaires sur la Législation des Mines, par Bury, Liège, 1860.

(*o*) Propriété des Mines en France et en Belgique, par Dalloz, Paris, 1862, tit. Belgique.

(*p*) Recueil des Lois, Décrets, etc., concernant des Mines, p. 17, 1856.

(*q*) Jurisp. du Cons. des Mines de 1850 à 1855, par M. Chicora, p. 95.



Council  
for mines.

The "Conseil des Mines," established by the laws of 1837, consists of a president, four directors (conseillers), and a registrar (greffier), nominated by the king, who has power to appoint other officers in case of need, and numerous regulations have from time to time been made by this assembly, and they now occupy generally the position which was assigned by the law of 1810 to the "Conseil d'Etat," but with this exception, that the new Department of Mines has no power to grant any further concession of iron mines, and consequently the number of concessions of iron mines is the same now as in 1837 (*r*).

Inter-  
national  
treaty re-  
specting  
companies.

A convention between her Majesty and the King of the Belgians, respecting joint-stock companies, was signed at London, November 13, 1862, which is as follows:

Art. 1. The high contracting parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorized in conformity with the laws in force in either of the two countries, the power of exercising all their rights, and of appearing before the tribunals, whether for the purpose of bringing an action, or for defending the same, throughout the dominions and possessions of the other Power, subject to the sole condition of conforming to the laws of such dominions and possessions.

Art. 2. It is agreed that the stipulations of the preceding article shall apply as well to companies and associations constituted and authorized previously to the signature of the present convention, as to those which may subsequently be so constituted and authorized.

Art. 3. The present convention is concluded without limit as to duration. Either of the high powers shall, however, be at liberty to terminate it by giving to the other a year's previous notice. The two high powers, moreover, reserve to themselves the power to introduce into the convention, by common consent, any modifications which experience may show to be desirable.

(*r*) Statistique Général de la Belgique, publié par le Ministre de l'Intérieur, 1852, Bruxelles.

## SECTION III.

## GERMANY, AUSTRIA, PRUSSIA.

*Prerogative of the Crown—Government Grants. Laws in the different States—Local Officers and Courts. Prussia: Royal Rights—Grants. Dues and Taxes—Laws 1810-1862. Austria: Laws 1854-1860—Royal Rights—Government Grants, first limited, then absolute.*

GERMANY is the country in which the opinion of a <sup>Prerogative of the crown.</sup> royalty in mines is supposed to have made its earliest appearance. Yet even here those who have bestowed most attention upon the subject have been unable to discover any trace of such a claim until the close of the eleventh century, nor does it appear to have been completely established until the end of the twelfth (s).

But about the middle of the twelfth century the sovereign princes of Germany seem to have succeeded in enforcing their pretensions. Frederick Barbarossa and his immediate successors took occasion to assert in their charters the right to mines, as ancient and undoubted regalia, in terms so strong as to announce their determination, at all events, to consider the prerogative as no longer open to question; and they accordingly granted or confirmed them to their subjects, or otherwise disposed of them for the benefit of the crown, at pleasure (t).

In these grants the reservation of the tenth, enjoined by the Roman law, also occurs (u). The crown, however, did not always confine its claim to this payment, but seems to have sometimes reserved in its grants a sort of partnership or share in the mines, in virtue of which it claimed a right to have a third measure or other definite portion of the mine itself. This dole or share, evidently

(s) Hülman's Hist. Regalia, p. 62, ed. 1806; Eichorn, Deutsche Staats und Rechtsgeschichte, vol. ii. p. 424, ed. 1835; Meyer, Bergwerksverfassung, &c., des Harzes im Mittelalter, pp. 2, 3.

(t) Gmelin, Geschichte des Teutschen Bergbaus, pp. 220, 241.

(u) Ante, p. 17.

the result of particular conventions, and not of any general disposition of the law, was called the *fron-theil*, and traces of it are especially visible in the ancient constitution of the mines of Bohemia, Saxony, and the Hartz. It has disappeared from the improved mine law of Germany; but the fact is interesting to those who recollect that the lead mines of Derbyshire, and the iron and coal mines of Dean Forest, in Gloucestershire, preserve the memory of this ancient usage.

The tenth or other profit of the crown has varied both in form and amount. It has been reduced to a twentieth, or thirtieth, or altogether remitted. It has been sometimes commuted for a fixed periodical payment (*v*), in other cases for a fixed rate of duty, regulated by the weight of the smelted metal. This occurs, for example, in the tin mines of Bohemia, at Schlackenwald, &c. In the latter form it is the equivalent of the coinage duty of our Stan-naries.

The consequences of the assumption of a royal property in mines and minerals, were important, and are supposed to have been beneficial to the interests of commerce. The princes of Germany, imitating the policy of the Roman emperors, invited adventure by indefinite liberty of search, on terms which gave to the adventurers a strong interest in their success. This liberty (the *freier-klärung* of the German mines) is indicated obscurely in the Iglavian mine laws of the thirteenth century, more distinctly in those of Wenceslaus II., and the system received its full development in the fifteenth and sixteenth centuries (*w*). The laws of Iglan are referred to as the earliest instance of this liberty of mining. There is an instrument of the twelfth century in which the Bishop of Trent (to whom Frederick had conveyed the royalty of the mines) is represented as granting to the *silbrarii*, or silver miners, of the Tyrol a general right of searching for mineral in a mountainous district, upon payment of a personal census by every one engaged in working, with a reservation of a

(*v*) Cancrin, p. 151.

(*w*) Gmelin, *Teutsch. Bergbau.*, p. 220 n.



further profit upon the discovery of a mine. The terms of the grant would remind the reader of the black and white rents of the Stannaries of Cornwall and Devon (*x*).

Variations  
of the  
laws in  
different  
States.

Iron and coal were not universally regarded among the regalia, but were subject to be worked by strangers where the owner of the soil declined to work them himself. It should be further observed that the different sovereign States of Germany have made variations in the ancient laws.

There are local officers for the administration of justice, and local courts of great antiquity; but these courts do not seem to embrace all subjects of contest between miner and miner. Ordinary suits and offences not connected with mining are left to the ordinary tribunals.

Local  
officers and  
courts.

By the general practice of Germany every one is entitled to a provisional right of search, and upon the discovery of a vein or other mineral deposit, the discoverer is entitled, as of right, to a grant of a certain measured space of ground for the purpose of pursuing his discovery, and the ceremony of bounding this area is announced by three consecutive proclamations. The demand which is made upon the bergmeister, or other local officer of the sovereign, cannot be refused unless there be conflicting claims, in which case the first finder, and not the first claimant, is entitled to preference. Hence the two *paræmiæ* of the law, “*Es hat jederman ein freyes schurfen*,” and “*Der erste finder ist der erste muther*.” The interest in the mine when granted is permanent, assignable, and transmissible, but is subject to the obligation of continual working, of payment of the tenth or other proportion, and of a small fixed quarterly rent, called *Recessgeld* or *Quatembergeld*, and considered by German lawyers to be “*in recognitionem feudi metallici*” (*y*). The interest in the mine worked under such a grant is divided into a number of shares prescribed by the law, usually one hundred and twenty-eight, of which a single share free of costs, or four shares subject to costs, at elec-

Govern-  
ment  
grant.

(*x*) Gmelin, *Deutsch. Bergbau*, p. 496, ed. [8. *Step. Com.*, vol. i. p. 220 n. (*k*).

174, edit. 4,

(*y*) Selchow, *Elem. Juris. Germ.*,

tion, are assigned to the landowner as a compensation for the easements claimed over his land. He is also permitted in some places to enjoy certain other privileges. A mine deserted by the grantee is declared vacant after three formal visits of the mine-master and jurats, and the lapse of a year without working *ipso facto* discharges his rights even without such formalities, and makes the "field free" (z). The use of timber, fuel, and water, and space for the necessary buildings, are provided either gratuitously or for fixed and reasonable payments; and as a further encouragement to labourers, they are exempt from various tolls and duties on articles of necessary consumption, from military service, from the obligations of a servile tenure or condition (frohudienste), from disability and forfeiture by reason of alienage, and from some other burdens; they have, moreover, a tacit hypothec on the produce for the amount of their wages.

PRUSSIA.

Prussia is chiefly rich in coal, iron, lead, and zinc, and in the latter mineral she occupies the first position among the nations of Europe. The mines in the provinces of Rhenish Prussia have remained generally subject to the French law of April 21, 1810 (a), even since those provinces were detached from the French empire; the provinces situate on the right of the river Rhine are regulated by the German laws.

Rights of  
the crown.

The royal prerogative in Prussia is retained over all fossils from which can be extracted any metallic or semi-metallic substances. The metallic substances comprise the precious stones and all other stones not expressly excluded by the code, every kind of salt, principally rock-salt, saltpetre, vitriol, alum, sulphur, lead, gum, and coals (b). The semi-metallic substances comprise antimony, bismuth, zinc, arsenic, and cobalt.

Government  
grant.

As soon as a discovery of minerals is reported to the government, it is inquired into by the Bergamt, who gives a provisional concession (müthung), and after a shaft has been sunk, and the government surveyor has been able to

(z) Cancrin, pp. 81, 82.

(a) Ante, p. 32.

(b) Vide Code for the Prussian States, Art. 69, 70, 71.

descend to inspect the mine, and he reports that there is reasonable ground for believing in the existence of minerals which might be profitably worked, the government grants another concession, which is definitive, and establishes the right to the mine. But as in France so in Prussia, no right of preference to the concession can be claimed by the proprietor of the soil (*c*).

The law for the Prussian States formerly imposed a duty of a tenth on the raw material (*d*), but by a subsequent decree of May 12, 1851, the duty has been reduced to a fifth. Whether the mines are worked or not there is a small duty of one thaler per annum paid on the concession (recessgeld) (*e*), and an additional duty of one per cent. on the value of the raw material, to defray the expenses of surveillance. Dues and taxes.

Various other laws have been passed, and on July 9, 1858, an edict was promulgated to the effect that mines which had ceased to be worked should be free to be undertaken by others. Lastly, three recent proposals of some importance, which were presented to the Chambers by the government, respecting the mines of Prussia, were passed into a law. The first relates to the duties of the Bergamt, the second defines the nature of the interest of a part owner, and the third relates to and provides for the reduction of one-fifth of the duties, from January 1, 1862, and a gradual reduction thereof till they amount to one per cent. only (*f*).

The mining laws of Austria were revised and amended by an imperial decree, dated May 22, 1854. The new laws came into operation on November 1, 1854, and apply to every part of the Austrian empire with the exception of Lombardy, Venetia, and Dalmatia. Art. 3 expressly reserves the acquired rights of all persons to mines. In pursuance of those laws, an order of the Minister of State for the Home Department, dated January 14, 1860, grants permission to Jews (*g*) to reside in the mineral districts of AUSTRIA.  
Laws of  
1854 and  
1860.

(*c*) French Law, ante, p. 35.

(*d*) Prussian Code, Art. 98, 101-105.

(*e*) § 5.

(*f*) Journal des Mines, 1861, p.

106. Zeitschrift für Bergrecht, Von Brassert v. Achenback. Köln, 1860. Bonn, 1862.

(*g*) Monit. Univ. du 21 Janr. 1860, p. 86.



Royal  
rights.

Bohemia, Hungary, Croatia, Slavonia, Servia, Transylvania, and the "banat" of Temeswar. A decree of April 27, 1860 (*h*), enables foreigners to carry on any commercial undertaking in the Austrian empire without obtaining naturalisation. The ancient royal rights of the State extended to every kind of mineral, and the new laws of May 22, 1854, confirm those rights (*i*). The sovereign is now entitled to a double duty, the one fixed depending upon the area of the mine; the other variable, being one-tenth of the value of the raw produce payable in money.

Government  
grant.

Any one may obtain a concession from the government, regard being had to the laws of 1548 relating to Bohemia and Hungary, to search for mines; the proprietor of the soil has no right to prevent it, and must even himself obtain the sanction of the government to open mines in his own territory. The concession is first granted for one year, and if the mines are afterwards explored it may be renewed (*j*). In order to obtain a right of search it is necessary that the applicant should make a request in writing to the government, either signed by himself or his agent, which must contain the following particulars:—the name, profession, and residence of the applicant; his license to reside in the country; the district to be explored; and if his demand is made through an agent, the authority of the principal must be annexed to the request (*k*). The concession, as a rule, is not exclusive, but several concessions may be granted for the same district, and they are not assignable without the sanction of the government (*l*). To obtain the exclusive right of exploring a certain district, the applicant must point out very clearly, in a memorial to be addressed to the Tribunal of Mines, the precise locality of the property he means to explore (*m*). The government may then, in either case, grant the concession for the limited period of one year; but there

License to  
search.

(*h*) Monit. Univ. du 3 Mai 1860, p. 526.

(*i*) Delebecque, t. i. nos. 47 et suiv.

(*j*) Law of 22 May, 1854, chap. ii. s. 15.

(*k*) Law of 22 May, 1854, chap. ii. s. 15.

(*l*) Law of 22 May, 1854, s. 20-24.

(*m*) Law of 22 May, 1854, chap. ii. s. 17-24.

are certain places which the grantees cannot explore without the consent of the proprietor of the soil; such as (*n*) inhabited buildings, enclosed places, every kind of garden ground, and lands enclosed with walls, cemeteries, or lands situate within twenty fathoms of the inhabited buildings and enclosed places before mentioned. The restriction applies also to public roads, railroads, rivers, fortifications, and the frontiers of the empire.

In order to obtain a renewal of the limited grant, and to make it absolute, an application must be made to the Tribunal of Mines, stating the following particulars: Absolute grant.

1. The name, residence, and signature of the applicant, or his agent with the authority of the principal annexed.

2. The description of the strata, and the nature of the substance discovered, the name of the landed proprietor, the name of the parish or district, and the precise limits and extent of the proposed works.

3. The precise spot of the discovered minerals.

4. When the research has been successful, the extent of the researches must be shown, together with the depth and course of the discovered vein.

5. The extent of the mines, and the name proposed to be given to the concession.

6. A declaration that the concession applied for is to be enrolled simply as a detached or independent concession, or as an addition to a previous concession.

7. A plan in duplicate, showing the course of the vein, on a scale of one inch to forty fathoms, must be annexed to the request (*o*).

8. Every application is advertised and inquired into by the government inspector, and, in a fortnight afterwards, a report is made to the head of the department, and a meeting of the commissioners appointed, at which the applicant may require the presence of men of science. The inquiry being concluded, the Tribunal of Mines decides whether or not to make the grant absolute.

(*n*) Law of 22 May, 1854, chap. ii. s. 17; compare with Art. 11 of iii. s. 49, 50.  
 French Laws of 1810, ante, p. 34.

## SECTION IV.

## SPAIN—MEXICO.

*SPAIN: Ancient Ordinances—Laws of 1859—Government Grants—How to obtain Grant—Dues and Taxes—Formation of Mining Companies.*

*MEXICO: Mining Laws of Spain when applicable—Durango—Chihuahua—Guanacanto—Foreigners' Privileges—Laws of 1823, 1842—Duties and Customs—Treaties of Commerce.*

SPAIN.  
Ancient  
ordi-  
nances.

IN Spain the pretensions and after-acquired rights of the crown became so deeply settled that, by the law of the *Partida*, mines were held not to pass in a grant of land, although not excepted out of the grant; and when included, the grant was valid only during the life of the king who made it, unless it was afterwards confirmed by his successors (*p*). Afterwards, by a law of Don Alphonso XI. (*q*), all mines of gold, silver, or any other metal whatsoever, and the produce thereof, were declared to be the property of the crown, and no one was presumed to work them, except under some special license or grant previously obtained, or unless authorized by immemorial prescription. This law was afterwards moderated by John I., and the law, as established by him, permitted the owner of the land, or a stranger with permission of the owner, to work mines on paying two-thirds of the produce, after deducting expenses, to the king. Philip II., revoking the former grants, again vested mines, whether in public or private ground, in the crown, but the object of so vesting them was not that the right of search should be limited to the crown, but in order to enable the people generally, under certain regulations and ordinances, such as the payment of a royalty, freely to make search for the minerals, especially when the proprietors of the soil refused to do so (*r*). Besides these, various other regulations were pro-

(*p*) Law 5, title 15, partida 2; book vi.; copied in the collection of and see Gamboa's Mining Ordinances, Castile, title 13, book vi. by Heathfield, vol. i. p. 17, edit. 1830. (*r*) Vide Law 5, title 13, book vi.

(*q*) Ordenamiento Real, title 1, Collection of Castile.



mulgated, which were known as the old ordinances. The new law of Philip II. did not interfere with the rights of the crown; but whilst it repealed some portion of the old law, it nevertheless granted permission to all persons, whether natives or foreigners, to search for mines, subject to the rules of that edict concerning the payments to be rendered to the crown and the other matters regulated by it (*s*).

Several codes of laws have from time to time been promulgated in Spain, modifying the ancient laws, and on July 6, 1859 (*t*), a new code of laws, entitled “*Legislacion de Minas*,” was passed, by virtue of which the mining laws of that country are consolidated and amended. By those laws all inorganic, metalliferous, combustible, and saline substances, and phosphite of lime, when they occur in veins which require mining operations, and precious stones, whether they are discovered on or beneath the surface, are declared to be the property of the State (*corresponde al Estado*), and no one has a right to search for them without a grant from the government; but stone, sand, and other substances required for building or agricultural purposes are exempt from the operation of the above-mentioned laws, as are also auriferous tinny sands, and other minerals found in beds of rivers, until they amount to such quantities as to require a mining establishment. When the government grants a concession, the grantee has to pay to the owner of the surface a fair value for so much of the land as he may require, and also to give security for the payment of a fair compensation for any future damage which may ensue to the surface in consequence of the mining operations undertaken or prosecuted under and by virtue of the concession.

Laws of  
1859.

Govern-  
ment  
grant.

The concession does not enable the grantee to work for minerals in vineyards, ornamental or pasture grounds, or within forty yards of any building, railway, public roads or canals, without the license of the owner of the surface, or of the governor of the State, nor within fourteen hundred

(*s*) Law 5, title 13, book vi. chap.  
i. Collection of Castile.

(*t*) Vide Edicion Oficial, Madrid,  
Imprenta Nacional, 1859.

yards of fortified places, without a license from the military authorities.

This concession, or what in the West of England is known as a "sett," is called in Spain a "pertenencia." The *pertenencia* is three hundred metros in length, two hundred in width, and of undefined depth, except in mines of iron, coal, and other inferior substances, where the *pertenencia* is five hundred metros in length by three hundred in width, and in cases of auriferous tinny sands and other minerals found in beds of rivers, sixty thousand square metros (*u*). The government, on being satisfied that the applicant has capital sufficient effectually to explore the ground, will grant more than one *pertenencia* to the same person, and a foreigner is placed on the same footing, both as to obtaining one or more *pertenencia*, as a citizen (*cudadano*). When several *pertenencias* are granted together, the formalities through which they have to pass are more complicated than where only one *pertenencia* is granted.

But before any application for a *pertenencia* is made (*v*), it will be well to consider in whose name it is to be granted. This is a wise precaution in cases at home as well as abroad, but it is essentially important in Spain, where the government looks to the grantee, and to him only, notwithstanding any subsequent assignment to other persons, to fulfil the conditions of the *pertenencia*.

How to obtain grant.

In order to obtain a *pertenencia*, the applicant must present a petition in writing to the governor of the particular State where the mine is situate (*w*), stating what *pertenencias* he requires, and giving reasonable evidence of his having discovered the existence of minerals in the ground he desires to explore, and within twenty days he must either deposit plans of the ground, or a certificate from the local magistrate (*alcalde*), that the ground has been properly marked out; the application is then regis-

(*u*) A metro is about thirty-nine inches.

(*v*) The form of application, as well as of the *pertenencia* itself, will be found in the "Legislacion de Minas," 1859.

(*w*) See form of petition in *Legislacion de Minas*, edicion oficial, Madrid, 1859.

tered, advertised in the official public journal (*boletín oficial*), and if no opposition is successfully made within a specified time the *pertenencia* is awarded to the applicant, not later than five months from the time of presenting the petition.

The above is a sufficient outline of the course to be adopted in order to obtain a *pertenencia* from the Spanish government; more particular information relating to them, as well as concerning the laws of mining generally in that country, will be found upon reference to the laws themselves, and to those works which we have already incidentally noticed (*x*).

There were originally two duties payable to the State, the one fixed, the other in proportion to the produce. Dues and taxes. The fixed duty for every rectangular mine of two hundred metres wide by three hundred long was three hundred reals-vellon (about three guineas) per annum. For mines of iron, coal, sulphate of soda, and rock-salt, a fixed sum of two hundred reals-vellon. Mines which had been abandoned and re-granted paid a fixed annual duty of four hundred reals-vellon for each space of forty thousand metres. If the mines were not rectangular, the fixed duty was levied in proportion to the superficies.

The proportional duty on the raw produce was three per cent., without allowing for any expenses of extraction, but the said proportional duty by the law of 1859 has been suspended for twenty years from that date on combustible minerals, iron, calamine, blende (mock ore), and their products, iron, coke, and zinc (*y*).

When the *pertenencia* is obtained, the next consideration is, the formation of the company to carry on the mine. Formation of companies. The grantee should first vest the *pertenencia* in the company, the rules and regulations of the company should then, if they have not been already settled, be finally determined upon, and whether the company is constituted under Companies Act, 1862, or as a private partner-

(*x*) Gamboa's Mining Ordinances of Spain by Heathfield, edit. 1830; Rockwell's Spanish and Mexican Laws, edit. 1851, New York; Le-  
 gislacion de Minas, edicion oficial, Madrid, 1859.  
 (*y*) Laws of 1859, chap. xii. s. 80-84.



ship, or in any other form, a clause in the deed of settlement, or other document which prescribes the rules, should be inserted to prevent any Spaniard from becoming a shareholder, as in such an event he would be enabled at any time to draw the whole concern into the Spanish courts of law; whereas if our precautions, and other analogous ones which will readily suggest themselves, be attended to in the formation of the company, such a consequence, often fatal in itself, may easily be avoided. Although these observations are made more particularly in reference to companies to be formed in England for working mines in Spain, they are applicable to all companies formed in England for working mines in any other State where the laws are confused, as in Spain.

**MEXICO.**

The mining laws of Spain were generally applicable to her colonial possessions, unless varied by the particular laws of any particular State, but when the earliest mining laws of Spain were passed, the mines situate in America had not acquired much celebrity, and those laws were therefore framed chiefly for the mother country; but it was afterwards directed by the law of the Indies, that the ordinances of the new code of 1584 should be observed in the colonies when not at variance with the municipal law; and in the year 1783 a code of laws was issued for *New Spain*, which was afterwards adopted in most of the other Spanish colonies. In the regulations which concern the working of mines, this code very closely follows the former ordinances, the most important changes introduced thereby being the erection of the Tribunal General de Minería, and the Disputaciones de Minería, to which exclusive jurisdiction in mining matters was confided; secondly, by the establishment of a bank of supplies; thirdly, by the organization of a school of mines.

**Independence established.**

Upon the establishment of the independence of the Spanish colonies, the seceding provinces generally retained the laws of the mother State, but they have since made such modifications of them as were necessary by changing a monarchical for a republican and federal form of govern-

ment without materially changing the mining laws (z). In Mexico, the principal alterations consisted in conferring exclusive and absolute jurisdiction on the local mining tribunal of each province, and by admitting foreigners to obtain and hold mining property on the same terms as citizens.

For the State of Durango it was decreed, in a congress Durango. held in 1824, that a Tribunal de Minería, or mining court, for appeals in the second instance, should be established; and by another decree, dated January 18, 1825, it was declared that this appeal-court should have the same jurisdiction as had previously been conferred upon the mining-court of Guadalajara.

For the State of Chihuahua, the contentious jurisdiction Chihuahua. of the mining deputations was, by an order of congress, dated March 16, 1826, transferred to the ordinary legal courts, and by another decree, dated October 7, 1826, these deputations were made amenable to the supreme government of the State, in all matters as to which they had previously depended on the general tribunal of Mexico, when not inconsistent with the republican system.

For the State of Guanacanto, by a decree dated April Guanacanto. 24, 1827, the jurisdiction in mining matters was also transferred to the ordinary courts of justice. By a decree of October 7, 1823, which was applicable to all the states of Mexico, foreigners were empowered to hold shares in the mines furnished by them with supplies of money or stores. And by three several subsequent decrees, dated respectively March 11, 1842, July 12, 1842, and August 31, 1842, the privileges of the foreigner were still further extended, and by virtue of which several decrees, his right to hold mining or other property in any state of the republic is secured. The following are copies of the said decrees: Foreigners' privileges.

The Sovereign Mexican Congress has resolved and decreed: Decree, Oct. 7, 1823.

1. That for the present there shall be a suspension of

(z) See Collection of Laws published in Mexico in 1829; Thompson's Laws of Mexico, p. 194.

the law 12, title 10, book v.; and of the law 5, title 18, book vi., of the collection of Castile; and also of the law 1, title 10, book viii.; and of the laws comprehended in title 27, book ix., of the collection of the Indies, together with the article 1, title 7, of the Ordinances of the Mines; which laws enact that foreigners, in order to acquire and work mines on their own account, should be naturalised, or tolerated with the express permission of the government.

2. This suspension only enables foreigners to contract with the owners of such mines, as are in want of capital, for supplying them with capital, in all the modes which are usual in such contracts, upon the terms that shall be most convenient to both parties, so that they may even acquire in property shares in the concerns to which they supply capital (*hasta poder adquirir en propiedad acciones en las negociaciones que habiliten*); such foreigners remaining liable, in all respects, to our ordinances concerning the working of the mines and the reduction of the ores, and to all the taxes and duties, subject to which the nation grants to its citizens the right of enjoying such property.

3. By consequence they are prohibited from registering new mines, from denouncing those which have been deserted, and from acquiring a share in any mine, except those to which they supply capital, under any colour or pretence whatsoever.

4. No alteration whatever shall take place for the present in respect of the excise duties, and the law relating to quicksilver, which article is excepted from all duty; all others used in the mines remaining subject to the usual excise duties.

The supreme executive power is desirous that the above article should be generally understood and carried into effect, and order that it be printed, published, and circulated.

Edict,  
March 11,  
1842.

Art. 1. Foreigners, not citizens, residing in the republic, may acquire and hold town and country property, by purchase, adjudication, denouncement, or any other title established by the laws.

Art. 2. They may also acquire ownership in mines of



gold, silver, copper, quicksilver, iron and coal, of which they may be the discoverers, in conformity with the ordinance of the branch.

Art. 3. Each individual foreigner cannot acquire more than two country estates in the same department without a license from the supreme government, and only under the boundaries which they now have, each independent of the other.

Art. 4. In the acquisition of town property in the cities, towns, and villages, as also in the lands contiguous thereto, in which they may wish to construct new estates, they shall enjoy the right to so much under similar circumstances and conditions.

Art. 5. Foreigners who, in virtue of this law, may acquire property, remain absolutely liable in regard to it to the existing laws, or those which may prevail in the republic, as to transfer, use, preservation and payment of imposts, without the power of alleging any right appertaining to being foreigners in regard to those points.

Art. 6. Consequently, all the questions of this nature which may arise, shall be decided in the ordinary and usual manner of the national laws, with the exclusion of all other intervention whatsoever.

Art. 7. Foreigners who may acquire country property, city property, or property in mines, and foreigners who may labour in them as servants, labourers, or journeymen, are not obliged to take part in the service of arms, unless in the way of police; but they are to pay the imposts which have for their object to keep up the militia.

Art. 8. If the foreign proprietor absent himself for more than two years with his family from the republic, without obtaining permission from the government, or if the property pass by inheritance, or by any other title, into the possession of persons non-resident in the republic, he shall be obliged to sell it within two years, counted from the day when his absence took place, or the change of ownership. If this be not done, the sale shall be officially proceeded with, with all the legal formalities, and of the proceeds the tenth part shall go to the informer; the nine-tenths remain-

ing shall be safely deposited at the disposal of the owner. This shall always be done when it is proven that the owner of the estate resides out of the republic, and he who is the nominal proprietor is only so in place of the absentee.

Art. 9. These arrangements do not include the departments on the frontier and bordering upon other nations, in regard to which special laws of colonisation will be enacted, without the power to foreigners to ever acquire property in them, without the express license of the supreme government of the republic.

Art. 10. In the departments which are not on the frontier, and which may have coasts, only at five leagues' distance from the coasts can foreigners acquire country property.

Art. 11. In order that foreigners who may have acquired property in the republic may be citizens thereof, it is sufficient that they prove before the political authority of the place of their residence that they are proprietors, that they have resided two years in the republic, and that they have conducted themselves well. The expediente drawn up in this manner will be sent to the proper department, by which the certificate of citizenship will be issued.

Art. 12. Foreigners cannot acquire royal or public lands in all the departments of the republic, without contracting for them with the government which possesses this right as representing the domain of the Mexican nation.

Decree,  
July 12,  
1842.

Know ye: That the decree of the 11th of March of this year, which so empowers foreigners to acquire landed property in the republic, in the manner set forth in the same decree, having been made public, some doubts have arisen as to the true meaning of the second article, and appeals have been brought to the supreme government arising from the different meaning which has been given to the said article. In view of all which, and bearing in mind the respective provisions and ordinances, I have thought proper, in the exercise of the powers conceded to me by the seventh of the bases accorded in Tacubaya, and attested by the representatives of the nation, to declare as follows:

“Natives or foreigners who shall fully prove that they

have been the restorers of old mines fallen into disuse or abandoned, shall be considered as discoverers, and consequently empowered by the second article of the decree of the 11th of March of the present year to acquire property in mines."

Antonio Lopez de Santa Anna, General of Division, Beneonérito of the Country, and Provisional President of the Mexican Republic, to all the inhabitants thereof: Decree, August 31, 1842.

Know ye: That in the exercise of the powers conceded to me by the seventh of the bases accorded in Tacubaya, and attested by the representatives of the departments, I have thought proper to declare as follows:

"The law of the 11th of March of this year, which empowered foreigners to acquire landed property, did not annul that of the 7th of October, 1823."

Since the separation of Mexico from Spain, the ancient duties have undergone alteration. By a decree of February 20, 1822, the duties for assaying, smelting, and coining gold and silver were modified. By that decree all the duties were reduced to three per cent. upon the value of the metals; and since 1822 there have been some modifications of the fiscal laws. The total amount of the present duties are four and a half per cent. on silver, and three per cent. on gold. With regard to the expenses of smelting and assaying the metals, there is no longer any fixed duty, but simply a trifling charge payable to the Custom-house authorities, to meet the expenses of their establishment. Duties and customs.

Treaties of commerce have since been entered into between the Mexican Republic and the Spanish and United States governments (a), and other laws have been passed for the benefit of the mining interest generally, but they affect more the administration of the mining laws than the laws themselves. Treaties of commerce.

(a) Rockwell's Span. and Mex. Laws, edit. 1851, pp. 489, 492.



## SECTION V.

## ITALY—SARDINIA—THE PONTIFICAL STATES.

**SARDINIA.** THE principal laws relating to Sardinia would appear to have been passed between the years 1723 and 1840 (*b*), but on November 20, 1859, a new code of laws was promulgated respecting mines, quarries, and mineral works. These new laws apply to Lombardy, recently annexed to Sardinia, as well as to the Marshes, but not to the provinces of Emilia, Umbria, Tuscany, and the Two Sicilies, and are based upon the French laws of 1810 (*c*).

Laws of  
1859.

Government  
grant.

Mines cannot be explored without a government grant under the penalty of one hundred francs, in addition to the confiscation of such of the minerals as may have been extracted, and compensation to the owner of the soil. These concessions are granted to foreigners as well as citizens. The proprietor of the soil has no right of preference, but the discoverer has, provided he applies for a concession within six months after the discovery has been made, and he has sufficient means to carry on the undertaking. Every application for a concession must be made to the governor of the province, accompanied by plans in triplicate, and after the surveyor has verified the plans, the application is advertised in the official gazette and local journals at the expense of the applicant; about thirty days after the grant is made, and within three months, the person to whom the grant is made must sign an agreement before the officer of the district to fulfil the conditions and obligations imposed upon him by the grant. Several concessions may be given to the same person.

Mines are subject, as in France, to two duties, the one fixed at fifty centimes the acre, but not in any case less than twenty francs; the other proportional, being five per cent. on the net produce (*d*).

(*b*) Leggi, Decreti, Regolamenti, concernanti le Sostanze Minerali, pp. 3 and 4. Torino 1861.

(*c*) Ante, p. 32.

(*d*) Tit. 3, chap. iv. of the Laws, 1859, Art. 59-63.

The government has a right, in special cases, to remit, either wholly or partially, the proportional tax (*e*).

The Pontifical government has the exclusive right to explore mines in the lands of private persons, and to grant concessions to strangers for the same purpose. The alum mines of Allumiera, and the vitriol mines in the territory of Viterbo, are worked by the government. When a grant is made, the government imposes whatever conditions it pleases, and the concessionnaires are under an obligation to compensate the owners of the land for all damages they sustain in consequence of working the mines. The amount of damages is settled by the government inspectors. If the government explores the mines the same compensation must be paid.

Pontifica  
States.

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#### SECTION VI.

#### RUSSIA.

*No Royal Prerogative in Private Lands—Grants in Crown Lands—Dues and Taxes—Private Rights.*

THE royal prerogative in Russia is limited to mines and minerals situate within the domains of the crown (*f*). These domains, unlike other countries, are of vast extent. They include entire provinces; for instance, Asiatic Russia, Siberia, and Kirghisia. But although royal rights are limited to crown lands, the government has an absolute control over the sale of all the precious metals, whether found in crown lands or in the lands of private persons. Those extracted from the crown lands of Siberia are obliged to be given up to the authorities, to be sold under the direction of the government, but the produce is paid to the owner of the mine (*g*), after deducting the duties and expenses of sale.

Royal pre-  
rogative.

(*e*) See French Lois of 1810, Art. 58.

(*g*) Reports of Minister of Commerce, No. 285, November and December, 1844.

(*f*) M. Tarassenko - Otreschkoff, chap. xiii. p. 168.

Grants  
in crown  
lands.

In order to search the crown lands, a license for that purpose must be previously obtained from the government. The person desiring the license must address a petition to the authorities at St. Petersburg, stating as near as possible the locality which he wishes to explore, and as the government is very anxious to promote mining operations, he will experience little difficulty in obtaining a favourable reply to his request. When he has discovered a mine, he thereby acquires a right to an absolute concession. In order to have this concession granted, the licensee must give a detailed description of the locality of the mine, and of the nature and character of the strata. This description is sent to the tribunal of the district, with a petition containing a declaration respecting the discovery. The application is then enrolled, and afterwards forwarded to the governor-general, with a petition from the applicant, soliciting the government to make the grant and define the limits of the mine. The matter is then investigated, and if no other grant has been made, an absolute grant is given to the licensee.

The dues and taxes imposed upon the mines are very heavy, and vary in the different States from twenty-five to thirty per cent.

Private  
lands.

The aristocracy and landed proprietors of Russia have secured to themselves greater privileges over their lands than have fallen to the lot of owners in other States. Even gold and silver form no exception to their absolute rights. They may explore their own lands themselves, or grant a license to others, without the interference of the government.

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#### SECTION VII.

#### AMERICA.

AMERICA.

AMERICA has no universal code of mining laws, and the decisions of her judges on the various questions which, from time to time, occur in her law-courts, are the main sources of authority upon the subject. Many of these de-



cisions are introduced into this work, especially under those important branches of mining law which relate to water-courses, and the right of surface and lateral support which the owners of one mine are entitled to receive from the owners of an adjoining mine (*h*).

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SECTION VIII.

FOREIGN LAWS, CORPORATIONS, AND COMPANIES.

*Foreign Laws and Judgments—Action on Foreign Judgments—Stay of Proceedings in English Courts whilst Action is Pending in Foreign Courts—Pending Appeal—Error in Foreign Judgment—Reversing Foreign Judgment—Taking Evidence in Foreign Proceedings, 19 & 20 Vic. c. 113; 22 Vic. c. 20. Ascertaining Law of Foreign States, 24 Vic. c. 11. Foreign Corporations and Companies—Domicil of Foreign Incorporated Company—Unregistered Foreign Company—Non-interference with Foreign Company—Proof of and Jurisdiction over a Foreign Partnership.*

IT has been decided, that, as a general rule, the legality of a contract must be determined by the *lex loci* where the contract was made (*i*); but when the law of a foreign State is repugnant to the fundamental principles of the *lex fori*, or when it is decidedly contrary to revealed truth or sound morality, it will not be followed or sanctioned in this country, and where a foreign tribunal, acts in defiance of the comity of nations by refusing to recognise a title properly acquired according to the laws of England, its judgment will be disregarded by the English courts (*j*).

A plea of judgment recovered in a foreign court of competent jurisdiction must show that the judgment is final and conclusive, between the parties according to the law of the place, where such judgment was pronounced (*k*); and to an action on a foreign judgment, it is no answer that the judgment is erroneous in law or equity, nor can the

(*h*) See Index.

(*i*) *Munroe v. Pilkington*, 31 L. J. 249; 9 Jur. N. S. 403. *Cood v. Cood*, Q. B. 81; 8 Jur. N. S. 557. *Branley v. South E. Rail. Co.* 12 C. B. N. S. 63. *Gladstone v. Ottoman Bk.*; 9 Jur. N. S. 246.

(*j*) *Simpson v. Fogo*, 32 L. J. Ch.

3 N. R. 275.

(*k*) *Frayes v. Worms*, 10 C. B.

N. S. 149.

defendant plead that the enforcement of the judgment in England would be contrary to natural justice, on the ground that the defendants had discovered fresh evidence showing that the judgment was erroneous (*l*).

Stay of  
proceed-  
ings whilst  
action  
pending  
in foreign  
court.

In the case of *Cox v. Mitchell*, a rule was moved for to show cause why the proceedings in an action brought in the Court of Common Pleas should not be stayed, pending another action brought in the Court of New York for the self-same cause at the suit of the same plaintiff. Whereupon Erle, C. J., said, "I think that this rule should be refused. The application is made for the interference of the court, and no authority from the books has been found in support of it. Although it may be a hardship upon the defendant to have his property doubly perilled, the possibility of hardship upon him is not a sufficient ground to my mind for our interference. And, even as to that, I should expect if he satisfied judgment against him in one country that he would not have to pay over again; but that the court in the other country would prevent the plaintiff from executing his judgment there. I cannot see why, if a man leaves America while an action is pending against him there, and comes over to this country, he should be relieved from an action here if an action lies. It is our duty to see that debts justly due are paid, and I can well understand that great prejudice might be worked to a plaintiff if we were to stay proceeding in such a case. There may be hardship on both sides; and, in the absence of authority, I think we ought not to interfere" (*m*).

In the case of *Munroe and others v. Pilkington and another* (*n*), Cockburn, C. J., in delivering judgment, said, "The defendants in their plea set out the record of the judgment at length, and conclude with an averment that the judgment is erroneous according to the law of New York, and is liable to be reversed; and that the defendants are prosecuting proceedings in appeal which are now pending. As far as regards this part of the plea, we expressed our

(*l*) *De Cosse Brissac v. Rathbone*,  
30 L. J. Ex. 238.

(*m*) 29 L. J. C. P. 33; S. C. 7 C. B.  
N. S. 55; 6 Jur. N. S. 225.

(*n*) 31 L. J. Q. B. 81.

opinion in the course of the argument that, though the pendency of an appeal in the foreign court might afford ground for the equitable interposition of this court, to prevent the possible abuse of its process, and on proper terms to stay execution in the action, it could not be a bar to the action itself. Pending  
appeal.

“A question of greater difficulty arises on the contention of the defendants, that on the face of the judgment of the court of New York, as set forth on the record, there appeared to be such error that the judgment could not be enforced here. It was not denied that, since the decision in the case of the *Bank of Australasia v. Nind* (o), we were bound to hold that a judgment of a foreign court having jurisdiction over the subject-matter could not be questioned, on the ground that the foreign court had mistaken their own law, or had come to an erroneous conclusion on the facts; but it was contended that, in the present case, the record of the judgment showed that the court of New York ought to have decided the case before them according to English law, and that they had either disregarded the comity of nations by refusing to apply the English law, or erred in their views of the English law; and that when either of these alternatives appeared on the face of a foreign judgment, such judgment ought not to be enforced in this country. Error in  
foreign  
judgment.

“It is not in our view of the case necessary to decide how far these objections could prevail if they were founded in fact, and as the question how far a foreign judgment may be examined is one of admitted difficulty, we do not desire to express any opinion on it further than may be necessary to decide the present case. In the present case, construing the record of the court of New York in the way most favourable to the defendants, we find there that the cause was referred by order of that court.

“Now, the transaction having taken place at New York, and the documents in question having been executed there, and having been intended to operate there, we are of

(o) *Bank of Australasia v. Nias*, 20 L. J. Q. B. 284; s. c. 16, Q. B. 717.



Reversing  
error in  
foreign  
judgment.

opinion that the effect of the circumstances in question in creating a liability on the part of the defendants to the buyers of the bills must depend on the law of New York. The court of New York, having full jurisdiction over the subject-matter, have decided that the effect of the transaction in question is to establish a contract between the defendants and the plaintiffs.

“Upon what grounds the judgment of the American court proceeded is a question on which it is unnecessary to speculate. It is enough that, being satisfied that the question of the defendant’s liability must be determined by the *lex loci* of the contract, we have the decision of a local court of competent jurisdiction as to what that law is. Our judgment must, therefore, be in favour of the plaintiff,” (*p*).

Taking  
evidence  
in foreign  
proceed-  
ings.

By 19 & 20 Vict. c. 113 it is provided that evidence may be taken in this country, and in Her Majesty’s colonies and possessions, respecting civil and commercial matters pending before foreign tribunals, and similar provisions are contained in the 22 Vict. c. 20 for taking evidence in suits and proceedings pending before tribunals in Her Majesty’s dominions, in places out of the jurisdiction of such tribunals.

Ascertain-  
ing law  
of foreign  
states.

An act was passed in the twenty-second and twenty-third years (*q*) of the reign of her present Majesty to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty’s dominions when pleaded in the courts of any part of her dominions, and by the 24 Vict. c. 11 an act was passed to afford the same facilities for ascertaining the law of foreign countries when pleaded in the courts of this country (*r*). By virtue of this latter act, any of the superior courts within Her Majesty’s dominions may remit a case, with queries, to a court of any foreign State with which Her Majesty may have made a convention for that purpose, for ascertainment of the law of such State, and the courts of Her Majesty may apply such opinion to the facts of any case before them; and, *vice*

(*p*) 31 L. J. Q. B. 89; see also  
Branley v. South E. Rail. Co. 9 Jur.  
N. S. 246.

(*q*) 22 & 23 Vic. c. 63.  
(*r*) 24 Vic. c. 11, *Login v. Princess*  
of Coorg, 30 Beav. 632.

*versá*, courts in Her Majesty's dominions may also pronounce their opinion on cases remitted to them by a foreign court.

A corporation duly constituted according to the laws of one State, may sue and be sued in the courts of any other State, either by its corporate name or by a name which it has acquired by reputation, but proof must be given that the corporation has been duly incorporated (*s*); and it is submitted that the same privileges would now be extended to companies formed under the Joint Stock Companies Acts (*t*).

Foreign corporations and companies.

But a corporation existing under a government not recognised by this country cannot sue in the courts here (*u*).

The principal place of business of an incorporated company must be considered the domicile of that company (*v*), and for the purposes of the Companies Act 1862, a company must be considered as resident in that part of the United Kingdom in which the company's registered place of business is situate (*w*); therefore, a company formed in this country for the purpose of carrying on business abroad, but having its principal place of business here, is clearly subject to the jurisdiction of our courts (*x*); and a foreign company carrying on business abroad, but having an office and an agent in this country, will probably also be held amenable to our courts (*y*). But although a foreign company may be amenable to the jurisdiction of the courts in this country, our courts will not interfere with the decisions of a foreign court of competent authority, or restrain the

Domicil of a foreign incorporated company.

(*s*) *Dutch West India Co. v. Moses*, 1 Str. 611; *National Bank of St. Charles v. De Bernales*, 1 C. and P. 569; *Sudlow v. Dutch-Rhenish Ry. Co.* 21 Beav. 43; *McKenzie v. Sligo and S. Railway Co.* 21 L. J. Q. B. 380.

(*t*) *Alivon v. Furnival*, 1 Cr. M. & R. 277; *Royal Bank of S. v. Cuthbert*, 1 Rose 462; *Welland Railway Co. v. Blake*, 6 H. & N. 410.

(*u*) *City of Berne v. Bank of England*, 9 Ves. 347.

(*v*) 4 Phill. Inter. Law, 128, 138; *Taylor v. Crowland Gas Co.* 11 Ex. 1;

*Shiels v. Great Northern Railway Co.* 30 L. J. Q. B. 331.

(*w*) 25 & 26 Vic. c. 89, ss. 8-10.

(*x*) *In re Madrid and Valencia Railway Co.* 3 De Gex and S. 127; *Butt v. Monteaux*, 1 K. and J. 98.

(*y*) See *Carron Co. v. Maclaren*, 5 House of Lords' Cases, 450; *Maclaren v. Stainton*, 16 Beav. 279; *Bank of Montreal v. Bethune*, 4 K. B. (Upper Canada) 341; *Washington County Mutual Insurance Co. v. Henderson*, 6 C. P. (Upper Canada) 146; *Welland Railway Co. v. Blake*, 6 H. and N. 410.

company from exercising in the country, where its principal place of business is, the rights and privileges which it there enjoys (z).

Foreign  
unregis-  
tered com-  
pany.

A company was formed in this country for working a mine in a foreign country without a deed of settlement, but according to the prospectus, and by the custom of the country, the shares passed by mere delivery of the certificates, and the affairs of the company were wholly managed by the board of directors. It was alleged that such a company was an illegal one, but Turner, L. J., in his judgment said, "It was, in truth, nothing more than an association of a large number of persons for the purpose of carrying on mining operations, or operations connected with mining, abroad, and no public mischief is shown to have been contemplated in the formation of the company, or to have resulted from it" (a). Whether, since the passing of the Companies Act 1862, the above judgment admits of any, and what, modifications, is a question which will bear discussion.

Non-inter-  
ference  
with  
foreign  
company.

A company was established according to the laws of the State of California, under the title of the Sierra Nevada Lake Water and Mining Company, the principal object of the association being to conduct water, by means of a canal, to be formed by the company from Lake Truekey in that State to various places within the same State. The company's affairs were managed in London. By the constitution of the company, half the shares were preferential shares in respect to dividends, the other half not so. There was power given to the holders of two-thirds of the stock to increase the capital, this power to be exercised by vote at a special meeting of the company. A large proportion of the capital was held by British subjects. The affairs of the company were such as to require that further capital should be raised, and the directors proposed a resolution that eight hundred ordinary shares should be converted into preferential shares, and the resolution was carried at a

(z) *Carron v. Maclaren*, *suprà*;  
*Bank of Australasia v. Nias*, 16 Q. B.  
*suprà*.

(a) *Ex parte Grisewood re Mexican  
and South American Co.* 28 L. J. Ch.  
775.



meeting of the company. A shareholder of ordinary shares filed a bill, and obtained an injunction to restrain the execution of the object of the resolution. The directors then obtained a resolution "that they should take the necessary steps abroad for increasing the preferential capital," whereupon the present bill was filed by the same shareholder, and one of the Vice-Chancellors granted an injunction to stay such proceedings:—Held, on appeal, that considering the domicile and purposes of the company, an injunction ought not to issue, there appearing on the face of the bill no equity to restrain the managers in the foreign country from making an application to the Legislature there (*b*).

To prove a partnership between a person carrying on business in England, and another person carrying on business abroad, it is not sufficient to show that the partner abroad had long traded there under the name of the firm in England and abroad, some clerks or other persons concerned in the management of the business abroad should be called to prove it (*c*); and in order to give jurisdiction over a partnership, one of three circumstances must be found to exist; either the domicile of the defendant in the suit, the subject-matter of the suit, or the partnership contract entered into or required to be performed, must have been entered into or be within the territorial jurisdiction of the court (*d*).

(*b*) *Bill v. Sierra Nevada Lake W. and Mining Company*, 29 L. J. Ch. 176; 1 De G. F. and J. 177.

(*c*) *Burgue v. De'Tastet*, 3 Stark. 53.

(*d*) *Cookney v. Anderson*, 8 Jur. N. S. 1220; 32 L. C. J. Ch. 305; L. T. N. S. 491; *Cood v. Cood*, 3 N. R. 275.

Foreign  
partner-  
ship.

## THE LAW RELATING TO MINES, MINERALS, AND QUARRIES IN THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

### CHAPTER IV.

#### RIGHTS OF THE CROWN :

BY PREROGATIVE.

BY SEIGNIORY.

BY STATUTE.

*The Existence of Minerals known to the Phœnicians, the Greeks, and the Romans—Classical Authorities—Mines under the Romans—The Civil Law—Rights of the Crown, from the Period of the Norman Conquest, reviewed—Protests of the Miners and Landowners against Royal Claims—The Great Case of Mines—Confirmation of Royal Rights and Private Rights, by Statutes 1 Will. & M. c. 30; 5 W. & M. c. 6—Rights of the Crown to Minerals under the High Seas—The Sea-shore—Definition of the Sea-shore—Rights of the Crown and Duchy of Cornwall defined by 21 & 22 Vic. c. 109—Right of the Crown to Mines in Derbyshire, Forest of Dean, Wales, Ireland, and Scotland.*

By reference to classical authorities we learn that from remote times the British Isles were known, and believed by some, to produce the precious, and by others the baser, metals. Borlase, in his "Antiquities of Cornwall," gives very sound reasons for supposing that the Phœnicians discovered Britain more than six hundred years before Christ, and that they traded with us solely, and without the least participation of other nations, for more than three hundred years; and what they came for we learn from Strabo, who says that from the Cassiterides the Phœnicians obtained their treasures of tin (*a*). Indeed, it is very probable that although *κασσίτερος* means tin, these islands were called

The Phœ-  
nicians.

(*a*) Strabo, lib. iii. de Cassiter.

the Tin Islands (Cassiterides), not by the Greeks, but by the Phœnicians, for they were so called long before the Grecians either traded here, or knew where the islands lay. Herodotus says that he knew nothing of the islands Cassiterides, from whence their tin came. It is not likely, therefore, that the Greeks would give a name to islands they knew not where to find, and, consequently, had no communication with, but through the Phœnicians; and, as the Chaldæans and Arabians call tin by a name of like sound (*b*), it is a just inference that the name Cassiterides was given by the Phœnicians.

Polybius, who flourished two hundred and four years before Christ, promised to write of the British Isles, and of their method of preparing tin (*c*); and Strabo says he kept his promise, but unfortunately this work of Polybius, with other useful compositions of the same author, is lost. Nearly three hundred years, however, before Polybius, Herodotus, in writing about Europe, says that the Greeks obtained their tin from the furthest part of Europe, the tin country alluded to being evidently Cornwall. He says, “ἐξ ἐσχάτης Ἑυρώπης ὁ κασσίτερος ἡμῖν φοιτᾷ (*d*). The language of Strabo, who was born the same year that Cæsar invaded Britain, is, *φέρει, καὶ χρύσον, καὶ ἀργυρον, καὶ σιδηρον*.

Tacitus (A.D. 61), in entering upon his description of the Ancient Britons, represents them as “Multis scriptoribus memoratos;” but, as our references have to do especially with the mines of Britain, I shall restrict myself to those Roman authorities who speak upon this subject. Cæsar, who invaded Britain before Christ 54, writes that tin was produced in the midland, and iron in the maritime counties. He says, “Nascitur ibi plumbum album in Mediterraneis regionibus, in maritimis ferrum, sed ejus exigua est copia; ære utuntur importato” (*e*). Cæsar was evidently incorrect as to the locality of the tin mines, seeing they occupy not the midland counties, but the south-western extremity. Tacitus, in his

(*b*) קסמורא קיסמירא,

(*c*) τῆς κασσιτήρου κατασκευῆς.

(*d*) Herod. iii. 115.

(*e*) B. G. V. cap. xii.



Agricola (*f*), says, “Fert Britannia aurum et argentum, et alia metalla, pretium victoriae gignit et oceanus margarita sed subfresca et liventia.” This statement of Tacitus, as to the precious metals, coincides with what we have quoted above from Strabo, but Cæsar makes no mention of gold or silver, and Cicero (B.C. 106) says, “In Britannia nihil esse audio neque auri neque argenti” (*g*); and, in another epistle (Ad Attic.), he says, “it was well known that not a single grain of silver could be found in the island.” The statements of Cicero do not tally with subsequent history (*h*); and are contradicted by modern authorities, for Camden speaks of gold and silver in Flintshire, and of gold in Scotland (*i*); and Dr. Borlase says that so late as the year 1753 several pieces of gold were found in what the miners call stream tin, and that silver was found in considerable quantities in several of our lead mines. We may add, moreover, that gold has recently been discovered in Wales, and silver in England. Whilst, therefore, the authorities here quoted afford evidence that from the earliest times these islands were famous for their production of the baser metals, they do not show that there ever was, as in the case of Mexico and Peru, gold and silver enough in Britain to be, as Tacitus thought, the price of victory.

The paucity of the precious stones, the obscurity in which the early history of Britain is involved, the insular position of the inhabitants, and the commercial ignorance of the people, when Cæsar landed upon the coast, will account for the above discrepancy of opinion in reference to minerals up to that period. Under the Romans we have no reliable information, and we can only refer to the civil law (*j*) as a guide to our investigation, not as positive proof of ancient royal, or of private rights; but from the Norman conquest to the present time we have reliable information respecting our mines. And here it may be observed, that no trace can be found of a claim to, or a royalty in respect of, coals, or other non-metallic mineral. This may

(*f*) Lib. cap. xii.

(*g*) Epist. ad Famil.

(*h*) Post, pp. 78, 80-84.

(*i*) Britannia, pp. 692, 741.

(*j*) See ante, p. 17.

be accounted for, as respects coal in particular, from the fact that it was not discovered to any extent, or, of sufficient value, till after the pretensions of the crown had yielded to the reasonable demands of the people. Metallic minerals were the objects which riveted royal attention, and to trace the origin and subsequent adjustment of those claims is the object of the present chapter.

William the Conqueror granted the earldom of Cornwall, with the principal part of his lands, to his half-brother, Robert Earl of Moreton and Cornwall; and it appears from Doomsday Book, 20 Will. I. A.D. 1086, that the earl at that time held two hundred and forty-eight manors in Cornwall. The other landholders in Cornwall at that period were the king himself, the Bishop of Exeter, the church of Tavistock, the churches of other saints, Judhel. de Totness, and Gosceline (*k*). William, the son of Robert, succeeded his father, and in 1140, having forfeited his possessions by joining in rebellion against King Henry I., the earldom reverted to, and remained in, the crown till Reginald, surnamed De Dunstanville, one of the illegitimate children of Henry I., was invested with the earldom by King Stephen; he, however, soon afterwards joined the party of the Empress Matilda against that monarch, and the county of Cornwall was again seized into the king's hands, and committed in trust to Allan Earl of Richmond. It was afterwards restored by King Henry II., in the twelfth year of whose reign the before-named Reginald appears to have held two hundred and fifteen knights' fees, and one-third part in the counties of Cornwall and Devon. The same Reginald died in 1175, leaving four daughters, but without legitimate male issue; whereupon King Henry II. retained the earldom in his own possession. It passed into the hands of Richard I., and in this monarch's reign we find documents which, whilst they refer particularly to Cornwall and Devon, may be quoted as evidence of the pretensions and ancient rights of the crown to all mines wheresoever situate. One of these

Ancient  
rights.

(*k*) See Exch. Records.

documents, which is still in existence, and in perfect preservation among the Records of the Exchequer, bears date in the ninth year of the reign of Richard I., A.D. 1198, is designated *Charta Stannariarum Domini Regis*, and purports to be a return to the Barons of the Exchequer of the execution by William de Wrotham and other commissioners of certain matters touching the Stannaries of Cornwall and Devon, the weights of the Stannaries, and the protection of the king's rights therein, and also a prohibition against carrying away any tin from either of the said counties without the permission of the chief warden of the said Stannaries (*l*).

From Richard the earldom passed to King John, and in the third year of that monarch's reign, A.D. 1201, he granted the celebrated charter of liberties to the tanners of Cornwall and Devon, which may justly be considered the foundation of their rights. The charter was confirmed by insepimus, 36 Hen. III. (*m*). In the sixteenth year of his reign, A.D. 1215, the king by a charter disafforests certain moors and woods excepted from his general charter of disafforestation (5 John), and confirms the rights of the men of the county to the services of their bondmen, unless working in the Stannaries (*n*). By these charters, John claims the Stannaries as his demesnes, quia Stannariæ sunt nostra dominica, and this fact, together with the enfranchisement of all Cornwall and Devon from certain of the forest laws, has led to the inference that all Cornwall was within the king's forests, and that all mines therein belonged to the crown. It cannot be denied that the charters require some explanation which has not yet been given of them, to take away their title to be considered evidence of the then rights of the crown to all mines whatsoever in that county, and if the supposition be well founded, by analogy of reasoning to all mines within his dominions wheresoever situate. But Mr. Smirke holds a

(*l*) Herme's Liber Niger Scaccarii, Stan. app. 8; Concanen's Rep. app. vol. ii. p. 860; Smirke's Stan. app. 197.  
p. 1.

(*n*) See Charter Roll, 16 John, fo. 206; Smirke's Stan. app. 9.

(*m*) Rot. Cart. ins. 18; Smirke's



contrary opinion. He says, "the fact that all Cornwall was within the king's forest is supported by no other proof than the charter of John, by which he professed to enfranchise the whole counties of Devon and Cornwall, with certain exceptions, from the forest law; even if this equivocal evidence of a very improbable fact could be admitted to establish it, it would still remain to be shown that all mines within the regard of a forest necessarily belong to the crown" (*o*). But the above charters are not the only evidence of the king's rights, for we find that King John, in the seventeenth year of his reign, granted the whole county with the demesnes, &c., to Henry Fitz-Count, who was an illegitimate son of the before-mentioned Earl Reginald, to farm, until the realm should be in peace and the king be satisfied, whether he ought to hold the same by right of inheritance, or whether it belonged to the king as part of the demesnes of the crown. The castle of Launceston was granted to Henry Fitz-Count on the like conditions. In the eighteenth year of his reign, A.D. 1217, a grant of the tithe of the farm of tin, in the counties of Cornwall and Devon, with all liberties and customs thereto belonging, was made to the Bishop of Exeter and his successors (*p*). And on the accession of Henry III. A.D. 1216, a further grant was made, by which the said Henry Fitz-Count was to hold the county with all its appurtenances, in as ample a manner as his father Reginald had held it, and not to be disseized thereof unless by consideration and judgment of the king's court. Falling, however, into the king's displeasure, the county was again taken into the king's hands and committed to the custody of Robert de Cardinan, with an express command to all the burgesses of the county, that they should in nowise coin any tin with the king's stamp which was in the custody of Henry Fitz-Count, until they should be otherwise commanded. William de Putot, shortly after this, received a grant of the custody of the county, with the coin and Stannary of Cornwall, and the castle of Launceston. In

(*o*) Smirke's *Stan.* app. p. 79.

(*p*) Charter Roll, 18 John; Smirke's *Stan.* app. 10; *Stan. Laws*, p. 57.

the fifth year of his reign, A.D. 1220, the custody of the Stannary of Cornwall was given to Fitz-Richard and de Croi for one thousand marks per annum (*q*); and a writ of protection for the tinnors of Cornwall and officers of the Stannary was issued (*r*). In the ninth year of his reign, A.D. 1225, King Henry III. committed the county of Cornwall, with all things which pertained to him therein, to his brother Richard during pleasure, and afterwards created him Earl of Poictou and Cornwall; and by charter, dated 10th August, 1231, the same king granted to his said brother the whole county in fee, together with the Stannary of all mines and minerals and other appurtenances belonging thereto (*s*). The exportation of uncoined tin out of Devon and Cornwall, was prohibited A.D. 1244 (*t*), and in this reign we have another instance of all mines of gold and silver, as well as of copper, being claimed, and actually seized as royal mines. It occurred in the forty-seventh year of Henry III., A.D. 1262 (*u*), at which time a writ was directed to the Sheriff of Devonshire, in which it was stated that the king had been given to understand that there were within his county aurifodinæ et cuprifodinæ; that is, mines containing gold together with copper, and he was commanded not to permit any one to occupy the same till the king should have provided that which the law required to be done (*v*). And this writ was followed by others, authorizing underwood to be taken from the woods of Chittlehampton, in Devon, to make charcoal for their works; and to erect a stone building for the deposit of treasure, utensils, &c., and for the habitation of the king's servants (*w*). Earl Richard died A.D. 1272, and was succeeded by his son Edmund. Edmund dying without issue, the earldom and its possessions fell into the hands of King Edward I. This monarch, in the thirty-third year of his reign, A.D. 1305,

Gold.

(*q*) Patent Roll; Smirke's Stan. app. 12.

(*r*) Clause Roll; Smirke's Stan. app. 13.

(*s*) Chancery Records in the Tower; Charter Roll, 15 Hen. III. m. 4; Concanen's Rep. app. 8.

(*t*) Patent Roll; Smirke's Stan. app. 14.

(*u*) Clause 47, m. 16.

(*v*) Smirke's Stan. app. 115; Ruding's Coinage, vol. i. p. 60.

(*w*) Patent Roll, 47 Hen. III. m. 8.

granted two charters; one to the tinnerns of Devon, and the other to the tinnerns of Cornwall. By these charters the ancient franchises and liberties of the tinnerns were confirmed; they consisted chiefly of freedom from personal molestation, and from servile obligations; from payment of certain market or other tolls, and talliages granted by the crown; and exemption from the jurisdiction of other courts in all matters as between themselves, and in all other matters as between themselves and strangers, if arising within the Stannaries, pleas of life or limb, and land excepted; together with an extensive liberty of mining according to ancient custom, subject to the right of pre-emption and other duties reserved to the crown. These charters also establish the antiquity of the Stannaries of Cornwall and Devon, as well as the pretensions, if not the rights, of the crown; the words in each of the charters, "*Sciatis quod nos ad emendationem Stannariarum nostrarum in com. Cornub. (et Devon) et ad tranquillitatem et utilitatem nostrorum Stannatorum,*" clearly implying the previous existence of the Stannaries; and the words, "*quæ sunt dominica,*" in the *Cornish* charter, and the words in each of the charters, "*Concessimus etiam eisdem Stannatoribus quod fodere possint Stannum et turbas, ad Stannum fundendum ubique in terris, moris, et vastis nostris et aliorum quorumcunque in comitatu prædicto,*" strong assertions of ownership (*x*). Both of the charters were allowed, and afterwards confirmed by Parliament in the thirty-fifth year of the reign of Edward I.; 1 Ed. III.; 17 Ed. III.; 1 Ed. IV., and 3 Hen. VII. (*y*). An exposition, declaration, and limitation, of the said charters, were made in Parliament in the fiftieth year of the reign of Edward III., A.D. 1377; 5 Rich. II.; 3 Ed. IV.; 1 Ed. VI.; 1 & 2 P. and M.; and 2 Eliz. (*z*). A further explanation thereof was made in the third and seventh

(*x*) Rot. Pat. 53 Ed. I.; Pearce's Stan. 1, 229.

(*y*) Coke's Entries, 467; Pearce's Stan. 1, 140, 185, 229; Smirke's Stan.

app. 14; Concanen's Rep. Rowe and Brenton, app. 198.

(*z*) Coke's Inst. vol. iv. p. 231; Pearce's Stan. 5, 140, 234; Stan. Laws, 57, 58.



years of the reign of Charles I. (*a*), and by an act of the British Legislature, 16 Chas. I. c. 15 (*b*), A.D. 1640, entitled "An Act against divers Encroachments and Oppressions in the Stannary Courts."

Prior to the granting of these two charters, it is stated that the tanners of Cornwall and Devon formed but one body (*c*); afterwards they seem to have acted independently of each other, holding separate Stannary parliaments, and making such laws as each deemed necessary for the government of its own mines; but the two counties were reunited into one mining district for all Stannary purposes by the recent act of 18 Vic. c. 32, s. 1.

A grant to the king's mines in Devon of freedom from toll on necessaries was made in this reign (*d*). This monarch also received great help towards the maintenance of his wars and other charges, from the silver mines, which in his days were found in Devonshire. In the accounts of William de Wimondham, warden of the mint, it appears that in the twenty-second year of that monarch's reign, enough to make 370 lbs. of fine silver was discovered in that county, and in the subsequent years other discoveries were made. William de Aulton, keeper of the king's mines in Devonshire and Cornwall in 1299, also accounted for silver as well as lead, thus giving further proof of the crown's prerogative (*e*).

Edward II. succeeded A.D. 1307, and endowed his favourite, Piers de Gaveston, with the earldom, together with the county, the demesnes, Stannary, and mines of tin and lead, and of certain lands in Devon, and all other the possessions which had been held by the late Earl Edmund. And by a subsequent grant, A.D. 1309, the said charter was confirmed to the said Piers de Gaveston and Margaret his wife, who was the widow of the said Earl Edmund (*f*). On the execution of Piers de Gaveston, the same king, A.D. 1318, granted a portion of these possessions, together

(*a*) Smirke's Stan. app. 35.

(*b*) Repealed by 18 Vic. c. 32, s. 18, so far as relates to the form of objecting to the jurisdiction, &c.

(*c*) Polwhele's Hist. Cornwall, vol. iv. p. 104.

(*d*) Patent Roll, 27 Ed. I. m. 35;

Smirke's Stan. app. 117.

(*e*) Ruding's Coinage, vol. i. p. 60.

(*f*) Charter Roll, 1 Ed. I.; Smirke's Stan. app. 17.

Silver.

Tin and  
lead.

with the "sheriffalty of Cornwall," to his queen, Isabel (*g*); but on her disgrace the property was committed for the time being to the custody of John Tregagu. During this monarch's reign, a petition to Parliament was presented, A.D. 1314, against the grant of pre-emption of tin, and in answer to that and other grievances, the petitioners were told that a commission of inquiry should issue (*h*)—a commission probably issued; however, A.D. 1316, there was a grant of pre-emption of tin for five years (*i*). In the year 1307, a commission was issued to compel the miners to work in the king's mines in Devon and Cornwall, except tinnerns actually working in the Stannaries of the earl (*j*), and in the year 1324, a commission to search for and extract gold from the tin mines of Cornwall and Devon Gold was issued, liberty being reserved to the tinnerns to dispose of the tin as they had used to do (*k*). It is said that the crown did not lay any claim to minerals in those counties, except tin, till the reign of Edward II., when that monarch granted to Piers de Gaveston, whom he created Earl of Cornwall, all mines of lead as well as of tin within the Stannary (*l*). It may be, that no other minerals were then either known or of sufficient value to justify any assertion of right over them. Copper had not then been discovered, and it was long after its discovery that its value was ascertained; we therefore incline to the opinion that the non-discovery of other minerals accounts for the crown not having made any claim to them; at any rate, we do not think because it had not laid claim to unknown or valueless minerals, that, therefore, the crown did not consider them as her property. Moreover, the pretensions of this monarch were not limited to Cornwall and Devon; for we find a commission was issued by the king in the twelfth year of his reign, and directed to John le Balauncer et Ricardi Champion, to search for and supervise silver and lead mines in the county of Westmoreland.

Pre-emption of tin.

(*g*) Concanen's Rep. app. 31.

(*j*) Patent Roll, p. 2, m. 16.

(*h*) 1 Rot. Parl. 308; Smirke's Stan. app. 18.

(*k*) Fine Roll, m. 15.

(*i*) Patent Roll, p. 2, m. 24; Smirke's Stan. app. 19.

(*l*) Smirke's Stan.

Edward III., in the fifth year of his reign, on receiving back the earldom, issued a commission to inquire into the usages and customs enjoyed by the tinnerns within the Stanaries since the charter of Edward I.; this commission cannot be found on the roll, but the loss has been accounted for (*m*).

Gold and  
silver.

The same king erected the earldom of Cornwall into a duchy (*n*), and in the twelfth year of his reign granted by statute, which was confirmed in the fifteenth year of his reign, free liberty to all persons to dig within their own soil for mines of gold and silver, and for hid treasure, on condition that all the silver so found should be carried to the mint to be coined there, the owner of the soil to receive one-third net of the money coined, the other two-thirds to belong to the king; the gold so found was likewise to be coined, one-half to belong to the owner of the soil, the other half to the king; and the king reserved the right to dig for the said mines himself, in case the owner of the soil omitted to do so (*o*).

Silver.

In the thirteenth year of his reign, the king commanded the sheriff of Somersetshire to repair to Melles, in that county, and to dig and examine into a mine there reputed to be rich in silver (*p*), and in order to provide a supply of fuel for the king's furnaces in Cornwall and Devon, the woods in the neighbourhood of his mines in those counties were ordered to be valued, and to be sold to his warden of the said mines (*q*). And in the eighteenth year of his reign, he gave a direction to his warden to report upon a mine of argentiferous lead at Cubert, in Cornwall (*r*). In the twenty-first year of his reign, petitions by the merchants of the cities, boroughs, and commonalty of the land, were presented to the parliament, against the pre-emption of tin, to which an answer was returned: "It is profit which belongs to the prince, and any lord may make his profit of his

Pre-emp-  
tion of tin.

(*m*) Smirke's Stan. app. p. 20,  
note a.

(*p*) Clause 13, Ed. III. pl. 1, m. 9.  
(*q*) Ruding's Coinage, vol. i. p.

(*n*) See post, chapter on the 61.  
"Duchy of Cornwall."

(*r*) Clause Roll, 18 Ed. III. p. 2,

(*o*) Fines, 12 Ed. III. m. 17; 15 Ed. m. 22.  
III. m. 4.



own" (*s*). And to another petition from Bodmin, in which the inhabitants complain that the officers of the prince would not allow them either to buy or coin tin, answer was made that "it is the free will of the prince to sell tin where he pleases, and thus it has been answered in full parliament" (*t*). Several petitions in this reign were presented to the prince complaining of grievances. The precise nature of these complaints will be best understood by a reference to the Council Book of the Black Prince, but we may observe that comparatively few of the entries relate to the Stannaries, neither are they confined to Cornwall, but concern all the possessions of the prince (*u*). And in the forty-fourth year of his reign he granted a lease of all mines of gold, silver, lead, and tin, which could be found in the county of Gloucester, that is to say, on the mountains, plains, and desert places (*v*). Henry V. directed an inquiry into the customs and franchises of his, the king's miners at Alston in Cumberland (*w*).

The only other documents which we think worthy of notice are the following: A grant (*x*) by Edward IV. to the tanners of Cornwall, of Turbary, and pasturage in Dartmore Forest; another grant of the same king to the Duke of Gloucester, and others, of all silver and copper mines in Northumberland, Cumberland, and Yorkshire, with liberty to buy wood of owners at reasonable prices; to impress labourers, to hold court and exercise jurisdiction, and to have letters of protection for mines, and those who contribute money to mines (*y*); and the charter of 23 Hen. VII., A.D. 1507, being a pardon for all breaches of Stannary laws, and a grant of a further franchise to the tanners, which was confirmed in the first year of the reign of Edward VI., and again in the first and second years of Philip and Mary, and twentieth of Elizabeth (*z*).

From these early notices of mines in England, we find

(*s*) 2 Rol. Parl. 168.

(*t*) Ibid. 180.

(*u*) Smirke's Stan. app. p. 24,  
note *d*.

(*v*) Clause Roll, 44 Ed. III. m. 7;  
Smirke's Stan. app. p. 118.

(*w*) Patent Roll, 4 Hen. V. m. 8.

(*x*) Ibid. 3 Ed. IV.

(*y*) Ibid. 3 Ed. IV. p. 1, m. 22;  
and Smirke's Stan. 121.

(*z*) Smirke's Stan. app. 31.

Result of  
authorities  
on royal  
rights.

the crown or its grantees exercising a very remarkable authority over them. They regulate the sale and export of all tin throughout the counties of Cornwall and Devon, enjoy ancient duties and impose new ones, receive payments in various forms from all persons engaged in mining or smelting, and claim a right to purchase, or rather to take at will, all the tin at a valuation wheresoever found, and whether in a raw or metallic state. But the acts of the crown amounted to more than interference. The "*Charta Stannariarum Dom. Regis*," the stringent regulations of Richard I., the charter of John, and the express declaration of that monarch that the Stannaries were his demesnes, the enfranchisement of the counties of Cornwall and Devon from certain of the forest laws, granting the county of Cornwall with the demesnes to Henry Fitz-Count, the confirmation of that grant by Henry III., who also received back and made other grants of the county, and of all the mines and minerals therein, and claimed and took into his possession mines of copper as well as of gold and silver, as appertaining to the dignity of his regalia, and the liberty given to the owners of the soil to dig within their own lands for mines of gold and silver, together with similar regulations applicable to all kinds of minerals and mines, and which were continued to a much later date, are strong assertions of ownership over all mines and minerals in the counties of Cornwall and Devon.

But the pretensions of the crown were not limited to those districts. Edward II. seized lead and silver mines in Westmoreland; Edward III. gave directions to dig for a silver mine, supposed to have been in Somerset, and this was followed by a lease of mines of tin and lead, as well as of gold and silver in waste districts in Gloucestershire. Henry V. directed an inquiry into the customs of his, the king's miners, in Cumberland, and made a grant of all silver and copper mines in the counties of Northumberland, Cumberland, and Yorkshire, and other grants and regulations were made by his successors, Kings of England, which evidently contemplated an adverse entry into the

waste lands of third persons, and do, we submit, afford some evidence of the claims made by the crown to all mines and minerals whatsoever and wheresoever situate in England.

If, however, high prerogative rights were originally entertained by the crown, they were certainly not always adopted or acquiesced in by the subject. At first the landowners of Cornwall and Devon complain only of *malicious* injury done by tinnerns for want of due coercion, and they petition to have the free emption or sale of tin as a reasonable set-off against the damage done to their land. "Quia non est consonum rationi quod illi quorum terræ per operationem stagminis illiis debeant aliquo modo impediri" (a). Afterwards, in the reign of Edward III. (b), they assume in their complaints to Parliament that the king's grant could extend only to his own demesne, and from a writ of procedendo (c), it appears that, in an assize of disseizin, the plaintiff denied the right of Edward I. to grant such easements in the freehold of the subject; whereupon the defendant prayed aid of the king. The result does not appear; but the record was cited in *Bastard v. Smith* (d). Still it is clear that, during that reign, the prince's tinnerns were actively working in places far beyond the limits of any duchy lands. The proceedings, taken upon the petition, 50 Edward III., point to the reasonable and proper view of this question, and that which, it may be presumed, the courts would take at this day. The rights of the tinnerns were referred to an inquisition, and a commission issued to ascertain by a jury, "what liberties had been duly allowed to the tinnerns, and what customs they had reasonably been used to enjoy since the making of the charter." Nevertheless, these protestations of the subject are feeble, when compared with the positive assertions of right made by successive kings.

Protests by the miners and landowners.

In the "Great Case of Mines," determined 1568 (e), the Attorney-General endeavoured to account for the rather

Great case of mines.

(a) Rot. Parl. 8 Ed. II.

(b) Ante, p. 82.

(c) Clause 12, Ric. II.

(d) 2 M. Rob. 129.

(e) Plowden, 327.



anomalous claims of the crown by stating as a general proposition, that all tin mines belonged to the king, because there is none without silver, and when the case of pre-emption came before the judges in the Star Chamber in 1607, they suggested as a reasonable origin of the right, that all lands in Cornwall might formerly have been the demesne of the crown, and have been alienated with a reservation of the mines; and that, at all events, it was "*certo certius* that all the land in England is derived mediately or immediately from the crown," and that "all the county of Cornwall was once within the forest of the king." (*f*). The argument of the Queen's Attorney-General in the Case of Mines was opposed to facts, because many mines had been discovered without any silver being found in them, and we are not therefore surprised to find the judges unanimously declaring that, "If the ore or mine in the soil of a subject be of copper, tin, lead, or iron, in which there is no gold or silver, in this case the proprietor of the soil shall have the ore or mine, and not the crown by prerogative, for in such barren base metal, no prerogative is given to the crown" (*g*). And the suggestion of the judges in the case of pre-emption, which assumed, as an historical fact, the feudal fiction of a derivative title from the crown, and that all Cornwall was once the demesne land of the crown, has not been generally received as borne out by the authentic records now in existence; on the contrary, the record of Domesday and the other documents which we have referred to, are proofs as well that the King of England was not, either at the time of that compilation or at the Conquest, the only or even a large landowner in that county; as also that the possessions of the Earl of Moreton, the first supposed Earl of Cornwall, though undoubtedly very large, were by no means co-extensive with the county or even the metalliferous districts of it (*h*). Neither of the reasons assigned, therefore, will account for the steady advances made in successive ages by the monarchs of England on the rights

(*f*) 12 Co. Rep. 9.  
(*g*) Plowden, 336.

(*h*) See ante, p. 75.

of private persons. Those pretensions, were however subsequently abandoned, and the crown divested of all rights in minerals, except gold and silver; these precious metals being retained, as it was said, for the purposes of coinage, and to support the dignity of the crown (*i*).

Sir Edward Coke says, "That *veyns* of gold and silver Royal mines. in the grounds of subjects belong to the king by his prerogative, for they are *royall* mines" (*j*). And the justices and barons in the "Great Case of Mines," unanimously agreed, "That by the law all mines of gold and silver within the realm, whether they be in the lands of the queen or of subjects, belong to the queen by prerogative, with liberty to dig and carry away the ores thereof, and with such other incidents thereto as are necessary to be used for the getting of the ore" (*k*). And so firmly was the prerogative of the crown then established, that it was argued that a mine being a royal mine, could not be severed from the crown. But the judges, nevertheless, agreed, "that a mine royal, whether of base metal containing gold or silver, or of pure gold and silver only, might be severed from the crown and granted to another by apt and precise words" (*l*). The only doubt which existed in the days of Elizabeth was this, whether if gold or silver was found intermixed with the baser metals, the whole became a royal mine? Some contended that any quantity of gold or silver so found was sufficient; whilst others held the opinion that the gold or silver must exceed in value the other metals; but the judges decided (*m*) by a very large majority that, even where the gold or silver in a mine of base metal, as tin, in the land of a subject, was of less value than the base metal, the mere circumstance of its existence causes the prerogative of the crown to attach upon it, and to make it a mine royal (*n*).

The uncertainty of the law consequent upon this deci-

(*i*) Plowden, 338; Black. Com. petre, 12 Coke, vol. vi. part xii. Stephens's edit. 1858, vol. ii. p. 208.

556.

(*j*) 3 Inst. 132; 2 Inst. 576.

(*l*) Plowden, 337.

(*m*) Ibid.

(*k*) Plowden, 336; see also the case of the king's prerogative in salt-

(*n*) Ibid. 310, 336; see also Rogers v. Brenton, 10 Q. B. 48.

1 Will.  
& Mary,  
c. 30.

5 Will.  
& Mary,  
c. 6.

sion caused universal distrust, and threatened to destroy the spirit of mining enterprise in this country, accordingly in the first year of the reign of William and Mary, an act was passed (c. 30), wherein it was declared that "no mine of copper, tin, iron, or lead, shall thereafter be adjudged, reputed, or taken to be a royal mine, although gold or silver might be extracted out of the same." This provision was considered insufficient, and in the fifth year of William and Mary, an act was passed (c. 6) entitled "An Act to prevent Disputes and Controversies concerning Royal Mines," wherein it was enacted "that all and every person or persons being subjects of the crown of England, bodies politic or corporal, that now or hereafter shall be owner or owners, proprietor or proprietors, of any mine or mines, within the kingdom of England, dominion of Wales, or Berwick-upon-Tweed, wherein any ore now is, or hereafter shall be discovered, opened, found, or wrought, and in which there is copper, tin, iron, or lead, shall and may hold and enjoy the same mine or mines, and ore, and continue in the possession thereof, and dig and work the said mine or mines and ore, notwithstanding that such mine or mines shall be pretended, or claimed to be a royal mine, or royal mines, any law, usage, or custom to the contrary, notwithstanding." But by the second statute, the crown, or any other person claiming royal mines under the crown, have the option of purchasing any of the said ores before removal, other than tin ore in the counties of Cornwall and Devon, upon payment of a price fixed by the said act—viz. for ore in which there was copper, £16 per ton; for ore in which there was tin, 40s. per ton; for ore in which there was iron, 40s. per ton; for ore in which there was lead, £9 per ton. The act expressly provides that nothing therein contained, should alter, determine, or make void the charters granted to the tanners of Cornwall and Devon, or any of the liberties, privileges, or franchises of the said tanners, or the laws, customs, or constitutions of the Stannaries, or any of them.

By the 35 Geo. III. c. 134, the right of pre-emption which is given to the crown, or those claiming under the



crown, so far as relates to any ore wherein there is lead, can only be claimed by the crown upon payment of £25 per ton, instead of the price fixed by the previous statute.

Upon reading these statutes together, it would appear :

1st. That the right of pre-emption thereby given to the crown, is limited to copper, iron, and lead, wheresoever found, and to tin if found anywhere in England, other than in Cornwall and Devon, provided such ores are intermixed with gold or silver. Effect of statutes on royal rights.

2nd. That the rights of the crown to all mines where gold and silver shall be discovered intermixed with any substance whatever, other than copper, iron, lead or tin, remains unaffected by either of the statutes of William and Mary.

3rd. That the rights of the subject to all mines of copper, iron, lead, and tin, even if gold or silver is found therewith, is confirmed by the said statutes, subject only to such right of pre-emption as aforesaid (o).

But if at any future period any other ores than those specified in the acts should be discovered, in which gold or silver should also be found intermixed therewith, it will be difficult to determine the respective rights of the crown and the subject to such a mine, unless the Great Case of Mines should be adopted in favour of the crown. Under any circumstances there is no provision made for the occurrence of such a discovery.

Independently of such a remote possibility, the law of England is now settled upon a satisfactory footing. Pure gold and silver, wherever found, whether in the demesnes of the crown, in public roads, highways, in waste or unappropriated lands, or in the lands and tenures of private persons, are the absolute property of the crown.

The crown, by virtue of its ownership of the high seas, is entitled to all mines and minerals beneath the soil; and the right of the crown also attaches to all lands suddenly left by the retirement of the sea, as well as to all lands gradually covered by the advance of the sea, and consequently to the minerals therein, unless custom has Minerals under the high seas.

(o) Rogers v. Brenton, 10 Q. B. 49.

conferred the ownership upon the subject; but the crown has no right where the change occurs by a sudden advance or recession of the water, or to lands formed by alluvion (*p*).

Minerals  
under the  
sea-shore.

The crown is also entitled to *all* mines and minerals whatsoever found upon the sea-shore (*q*), unless the lord of the manor, or the owner of the adjoining freehold, establishes a prescriptive title to them (*r*). The sea-shore has been defined to extend between ordinary high and low-water marks; but the right of the crown to the sea-shore has, in the absence of usage to the contrary, been limited by a recent case, and defined to be the line reached by the average of the medium high tides, between the spring and neap, in each quarter of a lunar revolution, during the whole year. In the case of the Attorney-General *v.* Chambers, and Attorney-General *v.* Rees (*s*), Baron Alderson said, "What, in the absence of all evidence of particular usage, is the limit of the title of the crown to the sea-shore? The crown is clearly, in such a case, according to all the authorities, entitled to the *littus maris* as well as to the soil of the sea itself adjoining the coasts of England. What, then, according to the authorities in our law, is the extent of this *littus maris*? This, in the absence of any grant, or usage from which a grant may be presumed, is, according to the civil law, defined as the part of the shore bounded by the extreme limit to which the highest natural tides extend: *quatenus hybernus fluctus maximus excurrit*; that is, the highest natural tide; for, according to Lord Stair's exposition, the definition does not include the highest actual tide, for these may be produced by peculiarities of wind or other temporary or accidental circumstances, concurring with the flow produced by the

Definition  
of the sea-  
shore.

(*p*) Gifford *v.* Lord Yarborough, 5 Bing. 164; Rex *v.* Lord Yarborough, 3 B. & C. 91; Lowe *v.* Govett, 3 B. & Ad. 863; S. C. 1 L. J. N. S. K. B. 224; see re Hull & Selby Railway; 5 M. & W. 327; Att.-Gen. *v.* Chambers; Att.-Gen. *v.* Rees, 4 De Gex, M. & G. 206; 4 De Gex & J. 55; Att.-Gen. *v.* Chamberlaine, 4 K. & J. 292, post, p. 153.

(*q*) Inst. 260<sup>b</sup>, note, 205; Selden's Mare Clausum; Hale de Jure Maris, 11; Gifford *v.* Yarborough, and cases cited *suprà*.

(*r*) Att.-Gen. *v.* Chamberlaine, *suprà*, and see post, "Prescription."

(*s*) 23 L. J. Chan. 665.

action of the sun and moon upon the ocean. But this definition, even thus expounded by the authorities of the civil law, is clearly not the rule of the common law of England. Justice Holroyd, no mean authority, in his very elaborate judgment in the case of *Blundell v. Catterall* (*t*), mentions this as one of the instances in which the common law differs from the civil law, and says that it is clear that, according to our law, it is not the limit of the highest tides of the year, but the limit reduced by the highest ordinary tides of the sea, which is the limit of the shore belonging, *primâ facie*, to the crown. What, then, are the highest ordinary tides? Now we know that, in fact, the tides of each day differ, in some degree, as to the limit which they reach. There are the spring tides at the equinox, the highest tides of all; these clearly are excluded in terms by Lord Hale, both in page 12 and in page 26 of his treatise ‘*De Jure Maris*’; for though, in one sense, these are ordinary, that is, according to the usual order of nature, and not caused by the accidents of the winds and the like, yet they do not ordinarily happen, but only at two periods of the year. These, then, are not the tides contemplated by the common law, for they are not the ordinary tides, not being of common occurrence. This may, perhaps, apply to the spring tides of each month, exclusive of the equinoctial tides; and, indeed, if the case were without distinct authority upon this point, that is the conclusion at which we might have arrived. But then we have Lord Hale’s authority in page 26 of *De Jure Maris*, who says, ‘Ordinary tides or neap tides which happen between the full and change of the moon are the limit of that which is called *littus maris*’; and he excludes the spring tides of the month, assigning as the reason, that the lands beyond them are, for the most part of the year, dry and manurable; that is to say, not reached by the tides. And to the same effect is the case of *Lowe v. Govett* (*u*), which excludes the monthly spring tides also. But we think that Lord Hale’s reasoning may guide us to the proper limit. What,

(*t*) 5 B. & Ald. 268.

(*u*) 8 B. & Ad. 863; 1 Law J. N. S. K. B. 224.



then, are the lands which, for the most part of the year, are reached and covered by the tides? The same reason that excludes the highest tides of the month which happen at the springs, excludes the lowest high tides which happen at the neaps; for the highest or spring tides and the lowest high tides (those at the neaps) happen as often as each other. The medium tides, therefore, of each quarter of the tidal period afford a criterion which, we think, may be best adopted. It is true of the limit of the shore reached by these tides, that it is more frequently reached and covered by the tide than left uncovered by it; for about three days it is exceeded, and for about three days it is left short in each week, and in one day it is reached. This point of the shore, therefore, is about four days in every week, that is, for the most part of the year, reached and covered by the tides; and as some, not indeed perfectly accurate, construction, but approximate, must be given to the words 'highest ordinary tides' used by Justice Holroyd, we think, after fully considering it, that this best fulfils the rules and the reasons for them given in our books.

"We, therefore, beg to advise your lordship that, in our opinion, the average of these medium tides in each quarter of a lunar revolution during the whole year, gives the limit, in the absence of usage, to the rights of the crown on the sea-shore."

In the same case the Lord Chancellor delivered his judgment as follows: "The question for decision in this case is, what is the extent of the right of the crown to the sea-shore? The right of the crown to the *littus maris*, whatever that means, is not disputed. The question is, what is the *littus maris*? Is it so much as is covered by ordinary spring tides, or is it something else? The rule of the civil law was—'Est autem littus maris quatenus hybernus fluctus maximus excurrit.' This is certainly not the doctrine of our law. All the authorities concur in the conclusion, that the right is confined to what is covered by 'ordinary' tides, whatever be the right interpretation of that word 'ordinary.' By 'hybernus fluctus maximus' is clearly meant extraordinary high tides; though speaking with physical

accuracy, the winter tide is not in general the highest. Land covered only by these extraordinary tides is not what is meant by the sea-shore. Such tides may be the result of wind, or other causes independent of what ordinarily regulates the flux and reflux.

“Setting aside these accidental tides, the question is, What is the meaning of ordinary? It is evidently a word of doubtful import. In one sense the highest equinoctial spring tides are ordinary tides, that is, they occur in the natural order of things. But this is evidently not the sense in which the word ‘ordinary’ is used when designating the extent of the crown’s right to the shore. This is apparent from Lord Hale’s treatise, *De Jure Maris*, pp. 12, 25, which is, in truth, nearly all the authority we have to guide us. Lord Hale says, at page 12, ‘The next evidence of the king’s right and property in the sea and arms thereof is his right of property to the shore and the *maritima incrementa*.’ Then, ‘for the shore, it is admitted that, *de jure communi*, between the high-water and low-water mark doth, *primâ facie*, belong to the king.’ Then, in a subsequent passage to which reference has been made, pages 25 and 26, concerning the right the subject may have in the sea-shore, he says, ‘The shoar of the sea. There seem to be three sorts of shoars, or *littora marina*,’ &c. Then, again, he refers to those two old cases to which he referred before. Then he says, ‘Ordinary tides, or *nepe tides*,’ using those two words as synonymous, ‘which happen between the full and change of the moon; and this is that which is properly *littus maris*, sometimes called *marettum*, sometimes *warettum*; and touching this kind of shoar, *viz.* that which is covered by the ordinary flux of the sea, is the business of our present inquiry.’ Disregarding, then, these extreme high tides, we next come to the ordinary spring tides, that is, the spring tides of each lunar month. No doubt, speaking scientifically, they probably may differ, but, practically, these differences may be disregarded. Lord Hale gives no absolute opinion, but he evidently leans very strongly against the right to lands covered only by spring tides, and refers to

decisions which support his views. Then he describes ordinary tides as if synonymous with neap tides. This leaves the question very much at large, and there is very little of modern authority. In *Blundell v. Catterall* (v), Mr. Justice Holroyd says, 'By the common law it, that is, the sea-shore, is confined to the flux and reflux of the sea at *ordinary tides*, meaning the land covered by such flux or reflux.' Still the question arises, What are ordinary tides? The nearest approach to direct authority is *Lowe v. Govett* (w). There certain recesses on the coast covered by the high-water of ordinary spring tides, but not by the medium tides between spring and neap tides, were held not to pass under an Act of Parliament which vested in a company an arm of the sea daily overflowed by it. Lord Tenterden held that these recesses were not ordinarily overflowed by the sea, which shows clearly that he did not consider the overflowing by ordinary spring tides to be what is meant by ordinarily overflowing; and both Mr. Justice Littledale and Mr. Justice, now Baron, Parke concur in saying that the recesses in question were above ordinary high-water mark; clearly showing their opinion to be, that what is meant by ordinary high-water mark is not so high as the limit of high water at ordinary spring tides. There is, in truth, no further authority to guide us; for the question did not arise in either of the cases of the *Attorney-General v. Burrige* (x) and the *Attorney-General v. Parmeter* (y). In this state of things we can only look to the principle of the rule which gives the shore to the crown. That principle I take to be, that it is land not capable of ordinary cultivation or occupation; or, according to the description of Lord Hale, as generally dry and manurable; and so it is in the nature of unappropriated soil. Lord Hale gives as his reason for thinking that lands only covered by the high spring tides do not belong to the crown, that such lands are, for the most part, dry and manurable; and, taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is,

(v) See *suprà*.(w) See *suprà*.

(x) 10 Price, 850.

(y) *Ibid.* 378.



that the crown's right is limited to lands which are, for the most part, not dry or manurable.

"The learned judges whose assistance I had in this very obscure question point out the limit indicating such land as the line of the medium high tide between the springs and the neaps; all lands below that line are more often than not covered at high water, and so may justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line; and I therefore concur with the able opinion of the judges whose valuable assistance I had, in thinking that that medium line must be taken as the boundary of the right of the crown. I cannot give any further direction at present." The Solicitor-General.—"Will your lordship permit me to observe, in order that there may be no misapprehension, that I take the decision to be this, that the *medium filum* is to be the *medium filum* of all tides throughout the year—that is, including the spring tides, the equinoctial tides, as well as the other?" The Lord Chancellor.—"Yes." Mr. R. Palmer.—"And ordinary tides?" The Lord Chancellor.—"I call for that purpose ordinary the ordinary equinoctial. I do not include in that anything that we sometimes hear of, when all the marshes are overflowed by some extraordinary operation of wind and tide."

From the cases of *Attorney-General v. Chambers* and *Attorney-General v. Rees*, before cited, it appears that Mr. Rees had been working a coal mine under the sea-shore. The evidence established the fact that the workings extended about one hundred and twenty yards to the south beyond the high-water mark of the spring tides, but not beyond the high-water mark at neap tides; and Chelmsford, Lord Chancellor, in delivering judgment, said, "The rights of the crown neither extend to the spring tides nor are confined to the neap tides, but their limits are the ordinary or medium tides;" and directed an inquiry whether the mines had been worked below the present or former line of high water at ordinary tides (z).

(z) See 4 De G. & J. 78.

Prescriptive right.

If the subject asserts a prescriptive right to the whole of the sea-shore, he will have to give evidence of such acts of ownership, in the absence of an actual grant, as would be sufficient to lead a jury to presume that there was once a grant of the fore-shore; this may be done, for instance, by showing that certain portions of the property, upon which they have erected valuable buildings, or the like, were formerly part of the fore-shore (*a*).

That part of the sea-shore which lies between high and low-water mark belongs to, and is part, of the adjoining county (*b*). The sea-shore below high water is an extra-parochial place for certain purposes and under some circumstances (*c*).

Rights of the crown and duchy defined.

It is only necessary further to remark that until very recently doubts existed and questions had been raised as to the respective rights of the crown and H. R. H. the Duke of Cornwall to mines and minerals lying under the sea-shore between high and low-water marks, and the estuaries and tidal rivers in the county of Cornwall; and also as respects the open sea below low-water mark adjacent to, but not in, or part of, the said county. These unsettled questions were at length decided by an act of the British Legislature, and at the same time provision was made for settling by arbitration any differences, which might afterwards arise in reference thereto. The Act of Parliament we refer to, the 21 & 22 Vic. c. 109, is called "An Act to declare and define the respective rights of her Majesty and of His Royal Highness the Prince of Wales and Duke of Cornwall to the mines and minerals in or under land lying below high-water mark, within and adjacent to the county of Cornwall, and for other purposes."

And after reciting an agreement dated 1st July, 1858, made and entered into on behalf of the crown and His Royal Highness the Prince, it was declared that:

(*a*) See *Att.-Gen. v. Chamberlaine*, ante, p. 90. also *Reg. v. Musson*, 27 L. J. Q. B. 222.

(*b*) *Embleton v. Brown*, 30 L. J. M. C. 1; 6 Jur. N. S. 1298; see (*c*) *Reg. on pros. of Earl Derby v. Gee*, 28 L. J. Q. B. 298.

“1. All mines and minerals lying under the sea-shore between high and low-water marks within the said county of Cornwall, and under estuaries and tidal rivers and other places (below high-water mark), even below low-water mark, being in and part of the said county, are, as between the Queen’s Majesty in right of her crown on the one hand, and His Royal Highness Albert Edward Prince of Wales and Duke of Cornwall in right of his duchy of Cornwall on the other hand, vested in His said Royal Highness Albert Edward Prince of Wales and Duke of Cornwall in right of the duchy of Cornwall as part of the soil and territorial possessions of the said duchy; but this declaration is not to extend to the mines and minerals in or under land below high-water mark which is part and parcel of any manor belonging to Her Majesty in right of her crown.

The rights  
of the  
Duke of  
Cornwall.

2. All mines and minerals lying below low-water mark under the open sea, adjacent to, but not being part of, the county of Cornwall, are, as between the Queen’s Majesty in right of her crown on the one hand, and His Royal Highness Albert Edward Prince of Wales and Duke of Cornwall in right of his duchy of Cornwall on the other hand, vested in Her Majesty the Queen in right of her crown as part of the soil and territorial possessions of the crown.

Rights of  
the crown.

3. It shall be lawful at all times hereafter for Her Majesty, her heirs and successors, and all and every persons and person who may for the time being be entitled in right of the crown to or to the management of any of the said mines and minerals lying below low-water mark under the open sea, adjacent to but not being part of the county of Cornwall aforesaid, and for her and their lessees or tenants, when and so often and so long as may be necessary for the purposes hereinafter expressed, to take or use or to pass through, over, or under any lands for the time being parcel or the soil and territorial possessions of the said duchy within the said county, and which lands shall be either in the occupation of tenants under leases or agreements made subsequently to the date of this Act, or in the

Liberty to  
work such  
minerals.



occupation of the Duke of Cornwall for the time being, in order to make or sink any pits, shafts, adits, drifts, levels, drains, watercourses, pools, or embankments, and to make, lay, place, use, and repair any spoil banks, roads, ways, bridges, and banks, and to make, erect, and repair any lodges, sheds, steam and other engines, buildings, works, and machinery in, under, upon, through, over, or along the said lands, or any part thereof, which may from time to time or at any time hereafter be required, and to do all such other acts as may be necessary or convenient for working, searching for, digging, raising, or carrying away, dressing, or making merchantable the same mines and minerals, giving to the Duke of Cornwall for the time being, and to any other person or persons who for the time being may be interested in the land so required, two months' previous notice thereof, stating the nature of the facilities required, and also making compensation and satisfaction to the Duke of Cornwall for the time being, and to other the person or persons, if any, for the time being interested in the said lands so taken or used to pass through, over, under, or along in the manner herein mentioned: Provided always, that no pit, shaft, adit, drift, level, drain, water-course, pool, or embankment which shall or may weaken, damage, injure, or endanger any house or other building, shall be sunk, driven, or made, nor shall any tram-road, waggon, or other way, or any works or machinery, be placed, laid, made, or erected, nor shall any minerals be dressed or made merchantable within fifty feet of any dwelling-house, or upon any garden or orchard, or so as to interfere with any mining works or operations for the time being of the Duke of Cornwall for the time being, his lessees or tenants.

Compensation.

4. Provided also, that Her Majesty, her heirs or successors, or other the person or persons making use of the said facilities, or any of them, shall make to the Duke of Cornwall for the time being, and other the person or persons, if any, for the time being interested as aforesaid, compensation and satisfaction for such facilities, and for any damage or injury occasioned thereby or consequent

thereon, to be ascertained as hereinafter provided; and further, that Her Majesty, her heirs or successors, or other the person or persons making use of the said facilities, or any of them, do and shall make, erect, and keep good and sufficient gates, rails, bars, or posts in all places where the same shall be necessary or proper, to shut up or enclose any breach, gateway, or opening which shall be made from time to time in any of the fences of the said lands, and shall also make all conveniences necessary and proper for the convenience and safety of the owners or occupiers for the time being of the said lands and other lands adjoining thereto, and of the public, in order to prevent any damage or inconvenience and trespasses upon the same lands, or any of them, by cattle or other animals.

5. In all cases where the said facilities or any of them shall be used upon, through, over, under, or along lands lying between high-water mark and low-water mark, part of the soil and territorial possessions of the duchy of Cornwall, the compensation and satisfaction to be made shall be a sum equal to one-fifteenth part of the net dues or monies to be from time to time received by Her Majesty, her heirs or successors, from the mines and minerals lying below low-water mark as aforesaid, which shall be worked and gotten by means of the said facilities, or any of them, in addition to compensation and satisfaction for or in respect of any building, wharf, or other artificial structure on the said lands which may be injuriously affected by the said facilities being used upon, through, over, under, or along the same, such compensation and satisfaction to be settled in the same manner as the compensation and satisfaction hereinafter provided for; and that when the said facilities or any of them shall be used on, through, over, under, or along any land other than lands lying between high-water mark and low-water mark as aforesaid, if the amount of compensation and satisfaction to be made for the same shall not be determined by agreement, then and in every such case the matter in difference shall be settled by arbitration by two arbitrators, one arbitrator to be named by the officer for the time being having the management of

Amount  
and mode  
of ascer-  
taining  
compensa-  
tion.

the land revenues of the crown in Cornwall, and another arbitrator to be named by the Duke of Cornwall for the time being, or by the council of the Duchy for the time being, or by other the person or persons, if any, for the time being interested in the said lands so to be used as aforesaid, and the matter in difference shall be determined by the said arbitrators, or by an umpire to be appointed by them before they shall enter upon the reference; and if such arbitrators or either of them, or such umpire, shall die or refuse or for seven days neglect to act, other persons or another person shall forthwith be named or appointed to supply the places or place of the persons or person so dying or refusing or neglecting to act, in the same manner as such last-mentioned persons or person were or was named or appointed; and further, the said arbitrators or umpire shall determine by whom and how the costs of the reference and award or umpirage shall in each case be paid, and they or he may call for any documents in the possession or power of either of the parties which may be deemed necessary for determining the matter in difference, and may summon and examine upon oath any witness, and administer the oath for that purpose.

Her Majesty not liable for damage done by her lessees.

6. Provided always, that Her Majesty, her heirs or successors, shall not be liable to the payment of compensation for any damage done by any lessee or other person in or about any searching or working for mines or minerals under the authority of this Act, but that such compensation shall be payable and paid by the lessee or other person committing such damage, his heirs, executors, or administrators.

Arbitration.

7. In case any difference shall at any time arise as between the Queen's Majesty in right of her crown, or any of her tenants under leases or agreements made subsequently to the passing of this Act on the one hand, and the Duke of Cornwall or any of his tenants, under leases or agreements made subsequently to the passing of this Act, on the other hand, as to the true line of high-water mark or of low-water mark, every such difference shall be settled by arbitration or umpirage, in the same manner and subject to the same conditions in all respects as is by this Act pro-



vided for the ascertainment in certain cases of the compensation and satisfaction to be made for the exercise of the facilities by this Act conferred with reference to the working of mines and minerals below low-water mark adjacent to the county of Cornwall.

8. In this Act the following expressions and words shall have the several meanings hereby assigned to them, unless there is something in the context repugnant to such construction; the expressions 'Duke of Cornwall,' and 'Duke of Cornwall for the time being,' shall comprehend the personage for the time being entitled to the revenues of the Duchy of Cornwall, and shall include Her Majesty, her heirs and successors, when there be no Duke of Cornwall; the expression 'mines and minerals,' shall comprehend all mines and minerals, and all quarries, veins, or beds of stone, and all substrata of any other nature whatsoever, and the ground and soil in, upon, and under which such mines and minerals, quarries, veins, or beds of stone, and other substrata lie; and the words 'the county of Cornwall,' shall mean the said county exclusive of any lands added thereto or taken therefrom by an Act passed in the seventh and eighth years of the reign of Her present Majesty, chapter sixty-one.

Interpreta-  
tion of  
terms.

9. Saving always to all and every persons or person, bodies politic or corporate, and their respective heirs, successors, executors, administrators, and assigns (other than and except Her said Majesty, her heirs and successors, in right of the crown, and His said Royal Highness Albert Edward Prince of Wales and Duke of Cornwall, and his successors, in right of the Duchy of Cornwall aforesaid, and all and every the person or persons, bodies politic or corporate, claiming or to claim under or by virtue of any grant, lease, agreement, or assurance made or entered into by Her said Majesty, her heirs or successors, in right of the crown, or His said Royal Highness, or his successors, in right of the Duchy of Cornwall aforesaid, or the council of the Duchy of Cornwall, at any time or times subject to the passing of this Act), all such estates, rights, titles, claims, and demands, whatsoever as they or any of them had pre-

General  
saving of  
rights.

vious to the passing of this Act, or might or could have had in case this Act had not passed.

Short title. 10. In citing this Act in any Act of Parliament, deed, or other legal instrument, it shall be sufficient to refer to it as 'The Cornwall Submarine Mines Act, 1858.'"

Derby-  
shire.

Forest of  
Dean.

The sovereign is also the owner in right of the Duchy of Lancaster to some of the lead mines of Derbyshire, and in right of the crown to the coal and iron mines and quarries of the Forest of Dean in Gloucestershire, but the respective rights of the crown and the subject in these districts, have been defined by recent Acts of Parliament, and are fully considered in subsequent chapters of this Treatise (*d*).

WALES.

The principality of Wales was united to England in the reign of Henry VIII., and by a statute (*e*) passed in that reign, the laws of England, and no others, were to be used in that principality. By another statute (*f*), it was, perhaps, superfluously declared, that whenever England is mentioned in any Act of Parliament, Wales should be thereby comprehended. The royal prerogative to gold and silver consequently extends to this part of Her Majesty's dominions, and as some recent discoveries have taken place, questions of an interesting nature may occur. In such an event the preceding observations on royal rights to mines and minerals in England will be applicable (*g*).

IRELAND.

The common law of England applies to Ireland, and the laws relating to mines are nearly the same in both countries. To make this plain, we remark that, formerly the Brehon law (so called after the judges, who were named *brehons*) prevailed in Ireland (*h*), but King John, in the twelfth year of his reign, went into that country, and there, "by the advice of grave and learned men whom he carried with him," by Parliament, *de communi omnium de Hiberniâ consensu*, ordained and established that Ireland should be governed by the laws of England (*i*), and not by the ancient Brehon

(*d*) See post, "Local Customs, Derbyshire, Gloucestershire."

(*e*) 27 Hen. VIII. c. 26.

(*f*) 20 Geo. II. c. 42, s. 3.

(*g*) See ante, pp. 75, 87-89.

(*h*) Co. Inst. vol. iv. c. 76, p. 358.

(*i*) Co. Litt. 141<sup>a</sup>, 142<sup>b</sup>.

or customary laws. The introduction of the common law of England into Ireland, would therefore unquestionably date from this period, although many of their princes swore allegiance to Henry II., and obedience to the laws of England A.D. 1172 (*j*). And at a parliament holden in Ireland by Howel Duke of Clarence, lieutenant there, anno 40 Ed. III., at Kilkenny, it was declared that the Brehon law was no law, but a lewd "custome" crept in of later times, and that it never was the law of the ancient "Britaines" from whom they were descended (*k*).

By another Act of Parliament, called Poyning's law, passed in the tenth year of Henry VII., it was enacted that, all statutes made in this realm of England before that time, should be of force and be put in use within the realm of Ireland (*l*). But although the common law of England was thus early established in Ireland, it was not so early or universally recognised. For a considerable period afterwards the more remote districts from the seat of government, continued in a great measure to govern themselves by their ancient laws, and even in the immediate neighbourhood of the government, the newly established laws were frequently disregarded. Poyning's law was repealed in 1782, and by the 39 and 40 Geo. III. c. 67, Great Britain and Ireland were united into one kingdom. Since the union, all Acts of Parliament extend to Ireland, as an integral part of the empire, whether expressly mentioned or not, unless that portion of the United Kingdom be expressly excepted, or the intention to except it be otherwise plainly shown (*m*).

Long before the union of the two countries, the crown had the same claim to mines in Ireland, as in England. Royal prerogative.

In the early part of the reign of Edward I., the mines in Ireland produced silver as well as copper, and other minerals, and were thought of sufficient importance to merit the attention of government. The king, therefore,

(*j*) Ferguson's Exch. Practice, Ireland, vol. i. intro.; Black. Com. by Stephens, vol. i. p. 92, ed. 1858.

(*l*) Ferguson's Exch. Ireland, intro.; Dwaris's Stat. p. 903.

(*k*) Coke Inst. vol. iv. cap. 76, p. 359.

(*m*) Dwaris's Stats. p. 526; Black. by Stephens, vol. i. p. 96.



in a writ directed to Robert de Offord, who was Lord Justice of Ireland, 1276, and the Bishop of Waterford, his treasurer, there commanded those persons to cause such mines to be opened and worked (*n*). And by another writ directed to Nicholas de Clare, the application of the king's treasure to the working of his newly-discovered silver, copper, lead, and iron mines in Ireland, was authorized, and Edward III. repeated the command (*o*).

Richard II., in the third year of his reign, granted to the owners of the soil in Ireland, the privilege of digging within the boundaries of their own lands, for gold, silver, and the precious metals, for the limited period of six years only, on condition that one-ninth part thereof be rendered to the king.

These acts of the three sovereigns of England though slight, are nevertheless, sufficient evidence of the advances made by the kings of England to mines in Ireland (*p*), since the union of the two countries, if not before. The sovereign right to mines of gold and silver is the same in both countries (*q*).

SCOTLAND.

The common law of Scotland differs materially from that of England and Ireland, and the prerogative of the crown to mines in the first-mentioned country, was abandoned in the reign of James VI. By virtue of a statute passed in that monarch's reign, A.D. 1592, the ancient prerogative of the crown over all mines whatsoever in Scotland, was released to private persons, subject only to the payment of a royalty, which was fixed at one-tenth of the produce. Before that period gold mines were entirely and absolutely the property of the crown, and so were silver mines, when three-halfpence of silver could be extracted from a pound of lead (*r*). Tin, lead, and copper, were also most probably inter regalia, by the common law; but it was resolved by the judges in 1755, that mines of lead and copper were not, either by the common law, or by

(*n*) Pat. 4 Ed. I. m. 10.

(*o*) Pat. Roll. 17 Ed. I. m. 8.

(*p*) Smirke's Stan. app. 5.

(*q*) See ante, pp. 75, 87-89.

(*r*) 1424, c. 12.

the statute of James, among the regalia (*s*), and, therefore, from that period, no other metals but the precious metals of gold and silver only, were among the regalia of Scotland. It is important to understand this question, because by the statute of 1592, a tenth of the produce of all mines which were *inter regalia* is reserved to the State; and whilst the decision above referred to excludes lead and copper, the statute of James VI. makes no exception whatsoever, but refers to all mines as being then in the gift of the crown. The law existing before and since the statute of 1592 is thus stated (*t*): "Gold mines are, by 1424, c. 12, declared to belong to the king without limitation; and silver mines, when they are of such fineness that three halfpennies of silver can be extracted from a pound of lead." The three halfpennies were in the reign of James I. equal in intrinsic value to about two shillings and five pennies of our present Scotch money, according to Ruddiman (*u*). It appears by the act of 1592, that not only mines of gold and silver, but of tin, copper, and lead, had formerly been annexed to the crown, and so not alienable without consent of Parliament; but they are by that statute dissolved from the crown, and it is made lawful to the king, to set in feu-farm not to any of his subjects indiscriminately, but to the baron or other freeholder of the ground, all metals or minerals that may be found within his own lands, on payment of the tenth part to the king, without any deduction of charges; and in case the freeholder should refuse to work them, the king may then, and then only, either work them for his own use or feu them to others. The meaning of this statute is in two material articles now fixed by decisions; first, that by the words "it shall be lawful to His Majesty," a positive right is conferred upon the freeholder by which he may demand a grant from the crown, in pursuance of the statute, Falc. 2, 120 (*v*),

(*s*) Erskine's Law of Scotland, p. 187; Sir A. Murray's case in Brown's Supplement. Dict. of Decisions, vol. v. p. 836.

Ivory, ed. 1828, book ii. title 6, sec. 16, p. 356.

(*u*) See Pref. to Dipl. Scot. p. 82.

(*v*) E. of Hopeton, Jan. 4, 1750;

(*t*) Erskine's Inst. of Scot. by Dict. p. 13527.

not in his character as vassal of the crown, but as owner of the soil (*w*); secondly, that by the word freeholder, is understood, in this question, not the superior of the lands in which the mines lie who hold immediately of the crown, but the proprietor, though he should hold of a subject (*x*); and, thirdly, that the law of Scotland differs from the English law in this respect, namely: that whilst in England the crown has an absolute right to all gold and silver (*y*), in Scotland gold and silver belong to the owner of the soil, subject to the payment of a royalty to the crown of one-tenth of the value of the ore without any deduction for expenses.

Since the union of Scotland, 5 Anne, c. 8, A.D. 1706, with England, all acts of the British Legislature extend to Scotland, unless there be an express proviso excluding that portion of the empire, or the intention to exclude it be otherwise sufficiently indicated (*z*).

(*w*) Bell's Principles of Scotch Law, 5 edit. p. 261.

(*x*) Dec. 7, 1739, D. of Argyle; Dict. p. 13526.

(*y*) As to gold mines in the Duchy of Cornwall, see post, p. 128.

(*z*) Dwarries's Stat. p. 526; Rex v. Cowle, 2 Burr. 853.



## CHAPTER V.

## RIGHTS OF THE DUCHY OF CORNWALL.

## SECTION I.

*Charters of Edward III.—Creation of Duchy, Grant of Manors in Cornwall and Devon—Habendum—Strict Entail—Explanation of Charter—Prince's case. Sale of some of the Manors—Reservation of Minerals. Assession Court—Commission for holding Court—Proceedings at the Court—Fines—Acknowledgments—Fealties—Heriots—Conventionary Tenant's Right—Dispute as to Minerals—Rowe v. Brenton—Legislative Enactments 7 & 8 Vic. c. 105—Commissioners' Award—Duke's Title to Work Minerals—Compensation to Tenants—Arbitration—Private Rights—Tin Bounds protected—Confirmation of Awards 11 & 12 Vic. c. 83—Commutation of Manorial Rights. Limitation of Action and Suits 23 & 24 Vic. c. 53; 24 & 25 Vic. c. 62—Title of the Duke to Gold and Silver—To Minerals under the High Seas and the Seashore.*

EDWARD III., in the fourth year of his reign, created his brother, John of Eltham, Earl of Cornwall (*a*), and in the following year, A.D. 1331, the king granted along with the earldom several manors and other lands to be held by the earl and his heirs for ever (*b*). The earl died about three years afterwards, on which event the earldom, with all its possessions, reverted to the crown. In the eleventh year of his reign the king, with the assent of Parliament, by charter (*c*) dated 17th March, 1337, erected the earldom into a duchy, conferring upon his eldest son, Edward Earl of Chester, surnamed the Black Prince, the title and honour of Duke of Cornwall, and granting some, although it would

(*a*) Charter among the Records in the Tower. the Dignity of a Peer, vol. v. app. v. p. 35.

(*b*) Copy of orig. in the Reports of (*c*) Charter, 11 Ed. III.

seem not all the manors which had previously been given to John of Eltham, together with the "sheriffalty" of Cornwall, which remains in the gift of the duchy to the present day, the Stannaries of Cornwall and Devon, the coinage duties, and sundry other possessions and privileges, to enable the newly-created duke to sustain his honour and dignity.

The following are extracts from the last-mentioned charter :

" We have, by the common assent and advice of the prelates, earls, barons, and others of our council, being in our present Parliament, convened at Westminster, given unto Edward, Earl of Chester, our first-begotten son, the name and honour of Duke of Cornwall, and have created him Duke of Cornwall; and have girt him with a sword, as is meet; and lest hereafter in any wise it should be turned into doubt, what or how much the same duke, or other the dukes of the said place, for the time being, ought to have in name of the duchy aforesaid, we have caused *all things in kind*, which we will to pertain to the same duchy, to be inserted in this our charter : therefore, we have given and granted for us and our heirs, and by this our present charter, have confirmed to our same son, under the name and honour of duke of the said place, the castles, manors, lands and tenements, and other things under written, in order that he may be able to sustain the state and honour of the said duke, according to the nobility of his birth, and the more easily to support the burdens incumbent in that behalf;" that is to say, inter alia, "the castle, borough, manor, and honour of Launceston with the park there, and other their appurtenances, in the counties of Cornwall and Devon; the castle and manor of Tremeton, with the town of Saltash, and the park there, and other their appurtenances in the counties aforesaid; the castle, borough, and manor of Tyntagel, with the appurtenances in the said county of Cornwall; the castle and manor of Rostonnel, with the park and other their appurtenances, in the same county, and the manors of Clymeslonde, with the park of Kerry Bullock, and other its appurtenances; Tybeste, with

Creation  
of the  
Duke of  
Cornwall.

Grant of  
manors and  
other  
rights in  
Cornwall  
and Devon.

the bailiwick of Pondershire, and other its appurtenances; Tewington, with the appurtenances; Helleston in Kerrier, with the appurtenances; Moresk, with the appurtenances; Tewarnayl, with the appurtenances; Pengkneth, with the appurtenances; Penlyn, with the park there, and other its appurtenances; Rellaton, with the bedelship of Estwyvelshire, and other its appurtenances; Hellerton in Trighshire, with the park of Ellesburgh, and other its appurtenances; Lyskyret, with the park there, and other its appurtenances; Calistock, with the fishery there, and other its appurtenances, and Talskydi, with the appurtenances, in the same county of Cornwall; and the town of Lostwythiel, in the same county: also our Stannary in the same county of Cornwall, together with the coinage of the same Stannary, and all issues and profits therefrom arising; and also with the explees, profits, and perquisites of Court of Stannary and *mine* in the same county"—“also our Stannary in the county of Devon, with the coinage, and all issues and profits of the same; and also with the explees, profits, and perquisites of the courts of the same Stannary, and the water of Dartmouth in the same county”—“Moreover, we have granted for us and our heirs, and by this our charter have confirmed the castle and manor of Lydeford, with the appurtenances, the chase of Dartmore, with the appurtenances in the said county of Devon, and the manor of Bradenash, with the appurtenances in the said county;”—“To have and to hold, to the said duke, and to the first begotten son of him and of his heirs, kings of England, and dukes of the said place, in the kingdom of England, hereditary to succeed; together with the knights’ fees, advowsons of churches, abbies, priories, hospitals, chapels, and the hundreds, fisheries, forests, chases, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats, and services of tenants, as well free as native, and all other things to the aforesaid castles, boroughs, towns, manors, honours, stannaries, coinages, lands and tenements, howsoever and wheresoever belonging or pertaining of us and our heirs; for ever”—“All which said castles, boroughs, towns, manors, honours, stannaries, coinages, lands and tene-

Habendum.  
Strict  
entail.



ments, as before specified, are together with the fees, advowsons, and all other things abovesaid, we do by this our present charter, for us and our heirs, annex and unite to the aforesaid duchy, to remain to the same for ever, so that from the same duchy they may at no time be in anywise separated, nor can be in any manner whatsoever, given or granted by us or our heirs to any other or any others than to the dukes of the said place : so also that the aforesaid duke, or any other dukes of the same place being deceased, and the son or sons to whom the same duchy, by force of our aforesaid grant, is known to belong, not then appearing, the same duchy, with the castles, boroughs, towns, and all other things abovesaid, shall revert to us or our heirs, kings of England, to be retained in the hands of us, and of the same our heirs, kings of England, until such son or sons, hereditarily to succeed in the said kingdom, shall appear as aforesaid, to whom, then, for us and our heirs, we do grant and will the said duchy, with the appurtenances, to be delivered successively to be holden in manner as is above expressed. Moreover, we have granted for us and our heirs, and by this our charter have confirmed to the aforesaid duke, that the same duke and the said first-begotten sons of him and of his heirs, dukes of the said place, shall for ever have free warren of all the demesne lands of the castles and manors, and other places aforesaid (so that those lands be not within the metes of our forests), so that no one else shall enter those lands to hunt in them, or take anything which, to free warren, shall pertain, without the licence and will of the same duke, and of other dukes of the same place, on forfeiture to us of ten pounds."

Explan-  
ation of  
charter.

The peculiarity of limitation and enjoyment instituted by that charter is worthy of observation. The legal title to the fee seems always to remain in the crown, a freehold interest only passes to the duke for the time being. The duke cannot alienate as against the crown, nor can the crown alienate as against the duke, nor can both conjointly alienate any portion of the property, or alter the disposition of it, in fact the dukedom and its possessions are in

every respect inalienable, except by an Act of the British Legislature. Moreover, the duchy and its possessions belong to the first-born son of the king only (*d*), who according to Lord Coke “natus est Duke of Cornwall,” and not under any circumstances to the second-born son, so that if the first-born son dies, and has a brother, that brother has no title; or if the first-born son dies when duke leaving issue a son, such son is not entitled to the duchy, and in either case the duke pre-deceasing the reigning monarch, the duchy goes back to the crown, and whenever there is no duke, the possessions of the duchy remain in the crown. But although the first-born son only of the reigning monarch is entitled to the dukedom, we find that by usage, the second son has been permitted to assume the title and to take the property. Such was the case with Edward VI., and Charles I., both of whom were Dukes of Cornwall, although they had had elder brothers. From the period when the duchy was constituted down to the present time (above five hundred years), the possession of the duchy has been nearly equally divided between the duke and the crown.

At the time of the creation of the duchy, and the grant of the aforesaid possession to the duke, the Stannary of Devon although included, was out on a lease for life to one Thomas West, at the “farm” of 100*l.* per annum, and Edward III., in the same year that he created the duchy, by letters patent dated 3rd October, A.D., 1337, after stating therein that he had forgotten the outstanding grant to West, directed West to be attendant on the prince for his rent, and declared that the Stannary of Devon should revert to the prince on the death of West (*e*). This charter was decided in the Prince’s case before referred to (*f*), to have the force of an Act of Parliament, proved, says Coke, “four manner of ways; 1. Out of the charter itself, and authorities in law agreeing to it; 2. By grants and estate made by the prince and letters patent of

(*d*) Prince’s case, 8 Rep. 1.

(*f*) 8 Rep. 1.

(*e*) Rot. Pat. 11 Ed. III.; Smirke’s Stan. app. p. 21, note 5.

kings; 3. By judgment given according to the ordinary course of law, and resolutions of the judges in the king's courts; 4. By resolutions in Parliament, by the king and the whole body of the realm." The same construction of the charter was assigned to it in the more recent case of *Rowe v. Brenton* (*g*). The charter has also received statutory recognition by 1 & 2 Vic. c. 120; 7 & 8 Vic. c. 105; and 11 & 12 Vic. c. 83, and it has been inferentially recognised by several Acts of Parliament which have been passed to facilitate the sales and exchanges, and enfranchisements, and the making of grants and leases of the lands and possessions belonging to the duchy (*h*). Soon after creating the duchy, and in the year A.D. 1338, a return was made by the commissioners appointed by the duke to take seisin of the possessions granted to him (*i*), and two other charters were immediately afterwards, and in the same year granted, the one giving to the newly-created duke the return of writs within the duchy (*j*), and the order granting various fees to the duke (*k*).

Sale of  
some of the  
manors.

Six of the manors belonging to the duchy of Cornwall were sold in or about the year 1798, under the provisions of the Land Tax Redemption Act, 38 Geo. III.; viz. Tybesta, Tewington, Tewarnayl, Helleston in Kerrier, Moresk, and Calistock, but on the sale of those manors, a reservation was made to the then Prince of Wales, and to his heirs and successors, Dukes of Cornwall, of all wrecks of the sea, and of *all mines and minerals* within and under the said manors, lands and premises, or any part thereof, with full liberty for him and his lessees to enter the said lands and to dig and search for, and to take, use, and work the said mines and minerals.

Reserva-  
tion of  
minerals.

Three of the seventeen manors of the duchy, viz. Tewington and Helleston in Kerrier, which were sold, and Clymeslände, still in the hands of the duchy, were ancient demesne lands to which the tenants had peculiar privileges; the others were not so (*l*).

(*g*) Concanen's Rep. 62, S. C. 8 B. & C. 737.

(*h*) See post, p. 130.

(*i*) Smirke's Stan. app. 21.

(*j*) Concanen's Rep. app. 45.

(*k*) Ibid. app. 47.

(*l*) *Rowe and Brenton*, 8 B. & C. 738, 758.



Prior to the creation of the duchy by charter of Edward III., and from thence down to a very recent period, there has existed in the duchy of Cornwall a court, called the Assession Court (*m*), constituted when a Duke of Cornwall exists, under the privy seal, and letters patent of the duke; or where there is no duke, by letters patent from the crown. This court was usually held for each manor every seven years, because the conventional tenants, it was said, held their lands from seven years to seven years in perpetuity, or rather took them afresh at this court for seven years (*n*), and therefore, at each of these courts a new assession roll and *arrentation* (*o*) was made up, in which the names of the tenants, the terms of holding, and change of property and ownership whenever from death, alienation, or otherwise, are specified; the last assession roll being the only proof of the holding. What the interest of these conventional tenants should be termed, whether a freehold, leasehold, or copyhold tenure, was matter of doubt. It is clear that there was a right for ever to the tenement from seven years to seven years; also, for the tenant to go to the Lord's Court, to pay fines, to renew the holding by a new cepit with a new fine, and to insist on the renewal being entered on the court roll, either to themselves, or to any person whom they might select, or in case of death to their heirs (*p*). But still the estate was not a freehold; it was less than a freehold, more than a leasehold; and it was not a copyhold, because many of the conditions of that estate were not annexed to it. It might be called a customary tenure, and in that sense a copyhold, or rather a conventional holding according to the custom of the duchy. In the case of *Rowe v. Brenton*, Lord Tenterden admitted that the holding was of a very peculiar nature unlike any other known in the king-

Assession  
Court.

(*m*) See commission and extract from the assession rolls from 7 Ed. III. to 43 Geo. III.; Concanen's Rep. *Rowe v. Brenton*. app. 77, 106.

(*n*) Lord Tenterden's judgment in *Rowe and Brenton*; Concanen's Rep. pp. 40 & 212; S. C. 8 B. & C. 765.; *Usticke v. Peters*, 4 Kay & J. 437.

(*o*) A term known to the old law, meaning "rent."

(*p*) Lord Tenterden's summing up in *Rowe and Brenton*; Concanen's Rep. 323, 327; S. C. 8 B & C. 736.

dom, but that the holding was uniform and the same, and that in order to learn the incidents belonging to any particular district, evidence of the rights of the lords and tenants in the other districts might be received (*q*).

Commis-  
sion for  
holding  
court.

It will enable the reader to understand the peculiar nature of the interest of the duchy tenants if we state shortly what the practice was in respect of the assessing and letting the conventional lands. A commission was issued by the prince or the crown, if in possession, for holding the court. The last commission, of which the original is in existence, was issued in 1787, under the privy seal of H.R.H. the Prince. Upon the issuing of the commission a precept was prepared, under the hands and seals of two or more of the commissioners, directed to the reeve of each separate manor; this precept was forwarded from the Duchy-office to the deputy stewards, and by them transmitted to the reeves, for the purpose of giving notice to the tenants of the holding of the court; notice having been given, the commissioners met at the place appointed for holding the Assession Court. The reeves and the tenants, or their proxies, being in attendance, the names of the jury, usually consisting of conventional tenants, were called, and the oath administered to them; the tenants were called over, and their different holdings and tenures read, verbatim, out of a book, by one of the commissioners. This book was called the assession book, and was made up thus: The deputy steward of each manor entered in a duplicate of the assession book, read at the last preceding assession, all the alienations and changes which took place between the two assessions; those alienations, which were made in form of surrenders and admittances, before alluded to, some deputy stewards noted down at the time on loose papers, while others entered them in a book kept for the purpose; and these memoranda were afterwards transferred to the margin of the duplicate assession book by the several deputy stewards. Copies of the same memoranda were also made out every year by the deputy stewards, and delivered to the deputy auditor at the annual audit, and by him brought

Proceed-  
ings at the  
court.

to the Duchy-office, and noted in the margin of the last assession book there deposited. Of the duplicate assession book, altered conformably to these memoranda, the deputy steward, before the assession, made two copies; and it was from one of these that the commissioner, at the assession, read over the names and tenements, as before mentioned; about the same time the assession book of the preceding assessioning, which was taken down by the duchy officers, who are included in the commission, was examined, in order to check the new book. Each tenant, on answering to his call, by himself or proxy, paid a small fee to the deputy auditor; the old tenants sixpence each, and the new ones who had appeared for the first time at the Assession Court one shilling for every alienation that had taken place since the preceding assession. Should a tenant not have appeared, the words "*non cepit*" were entered in the assession book against his name; and, according to the custom, should that occur at three successive courts, his tenement became forfeited to the lord, and might have been relet to a new tenant. The business having thus proceeded, the commissioners signed the book so read, and deposited it among the records of the duchy; the deputy steward kept the other copy, not signed by the commissioners, and entered in it the subsequent changes.

No payments, but those mentioned, were made by the tenants at the Assession Court; but though the lord did not actually receive any money at the court of assession, yet different fines and acknowledgments, both old and new, were then attached. These were collected by the reeves, and annually accounted for at the subsequent audits; and consisted, first, of a rent renewed by the assession roll, payable quarterly, but collected half-yearly, by the reeve; secondly, of the fine which was fixed at the assession, and entered on the roll; one-sixth part of which was collected every year, for the first six years of the seven, by the reeve; and, thirdly, of a payment called *new-knowledge*, which was due on every intermediate alienation between the assessions. Where a whole tenement was aliened, the *new-knowledge* money amounted to double the rent and

Fines.



double the annual portion of the fine; where part of a tenement had been aliened, then the portion, *pro rata*, of rent was doubled, as well as the portion of the fine, as before mentioned. It may facilitate the understanding of this part of the subject to give a calculation of a payment of this kind. For this purpose we will take the rent of the tenement at 4s., and the fine at 4s. 6d., and make the calculation on a supposition of there having been two alienations since the preceding assession. In this case, the double amount of the rent would be 8s., and double one-sixth, the annual portion of the fine, would be 1s. 6d., making a total of 9s. 6d., which would be the sum of the whole of the *new-knowledge* due for one alienation; but here there having been two alienations, that sum must be doubled, which amounts to 19s.; of this 6s. 4d., a third part, was to be paid in each of the three first years following the assession, and is the sum which was put in charge by the deputy auditor against the reeve for the year.

Acknowledgments.

There was also another payment, termed "ancient acknowledgments;" those were charged in an entire sum of 40s. on all the tenements of Tewington and some of the other manors, and were paid by the reeve in six annual portions. But, besides those payments, there were fealties, which amounted to 8d. each tenant, and were due upon every admission; they were paid at the audit by the deputy steward on behalf of all tenants intermediately admitted; and, in the court rolls, are often called "ancient acknowledgments." Lastly, there was a heriot, by custom, in each manor, though different in the several manors, due on the death of each conventional tenant. Certain articles, containing questions respecting the tenure and its incidents, under which the tenants held, were, at the Assession Court, delivered to the jury or homage by the commissioners. The answers to these questions were not returned until the audit of the following year, when they were brought by the reeve to the deputy auditor, signed by the jurymen.

Fealties

Heriots.

Nature of tenant right.

From this view of the transactions of the Assession Court it will be perceived that whatever might have taken place

at the intermediate periods between the assessioning it was at this court only that the new tenant could receive the valid confirmation of his estate.

The learned author of the "Inquiry into the Tenure of the Estates" observes (*r*): "Up to this time (Henry VIII.) the interest of the conventional tenant appears to have been treated in all respects as absolutely leasehold, and to have been attended with all the incidents of a common term of years. The instances of new letting merely on account of a larger rent being offered by a stranger occurred but rarely, even in earlier times; and at length the conventional acquired by the indulgence of the lord, or, more properly, of the duchy officers, the certainty of a renewal of his lease at the same rent, excepting in the case of forfeiture for breach of the terms of his tenancy." It will therefore appear, from what has been said, that the notion of the hereditary rights of the conventional tenants was derived from the language of the entries of the holdings and the transfers on the court rolls; but the nature of the tenure of the conventional tenants could only be ascertained by comparing the entries on the assession rolls, made under the authority of the commissioners, and the wording of the surrenders and admissions, as made before the deputy stewards. The uncertainty of the tenure caused by those several entries gave rise to the great case of *Rowe v. Brenton*, which we have already incidentally referred to, and in which, *inter alia*, the right of the duchy to the minerals in the conventional tenements was disputed by the conventional tenants (*s*).

In order to understand the nature of this dispute it is requisite to observe that in the seventeen assessional manors which were attached to the duchy (*t*), there was certain land known as the duchy land; there was also in the manors or in some of them, certain other land known by the name of fee land, which is land held in fee by the owner of the soil. The minerals in the land held in fee belong to the owner

Dispute as to minerals.

(*r*) Appendix to Manning's Exch. p. 378.

(*s*) Concanen's Rep. *Rowe and Brenton*; S. C. 8 B. & C. 376.

(*t*) See ante, pp. 108, 112.

Rowe v.  
Brenton.

of the fee, and no claim had ever been made to them by the duke; but the duke had always claimed the minerals in the duchy land, and his right does not seem to have been disputed till about the year 1829. In that year the well-known case of *Rowe v. Brenton* was tried (*u*). Lord Tenterden, in summing up the case to the jury, said the real question was this, whether the owner of a conventional tenement, that is, of "duchy land," was entitled to the mineral found under it, or whether it belonged to the Duke of Cornwall; and that there was no question as to the right to dig for it, "That in many manors" (he proceeded to say) "it happened that the lord of the soil was entitled to the minerals, but had no right to enter the lands of the copyhold tenants to search for and obtain those minerals without the consent of the tenant, and that all the evidence given by the plaintiff as to the interruption of workings might be explained by the right of the tenant to prevent the owner of the minerals digging for them without his consent." His lordship then directed the attention of the jury to the documentary and parol evidence, and observed that even allowing the conventional tenants to have in their estates the largest interest that they had ever claimed, viz. from seven years to seven years renewable for ever, that would not give them a right to the minerals; and although a distinct positive usage for the conventional tenants to take the minerals might be valid in law, it was incumbent on them to prove it, for otherwise the right would remain in the lord (*v*). The jury found a verdict for the defendant. The result of the verdict was equivalent to saying that the duchy was entitled to all the minerals within the conventional tenements, that is, in the so-called duchy land; for although copper only was in dispute, tin and other minerals were incidentally referred to.

The uncertainty of the interest of the conventional tenants, the dispute about minerals, and the unsatisfactory

(*u*) Concanen's Rep. p. 316.

(*v*) *Rowe and Brenton*, 8 B. & C. 766; Concanen's Rep. 313; see this case commented upon in *Marquis An-*

*glesey v. Lord Hatherton*, 10 M. & W. 237, and referred to under title, "Copyholds in this work."



state of the duchy manors, induced the British Legislature to interfere. Accordingly, an Act of Parliament was passed (7 and 8 Vic. c. 105), entitled "An Act to Confirm and Enfranchise the Estates of the Conventiary Tenants of the ancient Assessionable Manors of the Duchy of Cornwall, and to Quiet Titles within the County of Cornwall as against the Duchy, and for other purposes." By this Act, the before-mentioned charter of 11 Edward III. is confirmed, and commissioners are by the said Act appointed with full power to ascertain and define the nature of the interests of the conventiary tenants on the one hand, and the rights of the duchy on the other, and to make awards, finally to settle all matters in dispute. The recital contained in the first section of the Act contains a complete history of the duchy from its creation up to the passing of the Act, and deserves attention. Sections from the second to the twelfth inclusive, authorize the appointment of the commissioners and a secretary, the removal of any of such officers, and prescribe the meetings to be held by such commissioners, and the notices to be given of such meetings, and refer to other matters now unimportant in consequence of a subsequent Act (*w*) which precludes inquiry in reference thereto, or the proceedings of the commissioners. By the 13th section it is provided that the commissioners should inquire and ascertain which of the conventiary tenements, and what waste lands, manors, mines, and minerals, belonged to the duke, and the boundaries, identity, and the situation thereof. The 15th to the 30th section inclusive, refer to the proceedings to be adopted for obtaining an award; the 31st section contains directions to the commissioners respecting the course to be pursued by them before making their award.

The 33rd to the 37th section inclusive, provide for the completing the award, and re-hearing of objections thereto and the amendment thereof; and the 38th section enacts that after these matters have been duly attended to, the commissioners shall make and sign their award. The award is to be in triplicate—one copy to be lodged in the Duchy-

Legislature  
7 & 8 Vic.  
c. 105.

Commis-  
sioners'  
awards.

(*w*) 11 & 12 Vic. c. 83. s. 1.

office, another with the clerk of the peace for the county of Cornwall, and the third with the registrar of the Stannary Court—copies of which may be obtained on inspection thereof had, on application. And then it is further enacted, that after such award shall have been made and executed by the commissioners, the same should for all purposes be binding and conclusive as to the subject-matter thereof (*x*); and all conventional tenements held of the unsold manors are ever thenceforth to become freehold of the manors of which they had been held, subject to the payment of the annual sums fixed by the award (*y*); but the Act was not to confirm to any person other than the Duke of Cornwall any estate or interest whatsoever which was first granted at an assession court of any of the said manors mentioned in the first schedule of the Act held within sixty years before the 1st of May, 1844. From and after the passing of the Act, all such tenements were to all intents and purposes to become part and parcel of the demesne lands of the manor within which the same were situate (*z*).

And it is further declared and enacted (*a*), “that all mines and metallic minerals in and under all and singular the tenements now or at any time within one hundred years before the said first day of May, 1844, held as conventional tenements of the said manors mentioned in the said first schedule hereunto annexed respectively, and all mines, minerals, stone, substrata, and all other profits whatsoever in, upon, under, and of all waste and other demesne lands of the same manors respectively, and all mines, minerals, stone, and substrata in, upon, under, and of all other lands lying within or parcel of the same manors respectively (and which said last mentioned mines, minerals, stones, or substrata, shall by such award be determined to belong to the Duke of Cornwall), do and shall belong absolutely to the Duke of Cornwall as possessions by the hereinbefore recited charter granted, and thereby annexed to the duchy of Cornwall as aforesaid, but without prejudice to the

(*x*) Secs. 39, 40; see also secs. 48-52.

(*y*) Ibid. 41.

(*z*) Sec. 42.

(*a*) Ibid. 53.

estates or rights, if any, of any of the present lessees of the Duke of Cornwall therein."

A similar provision is inserted in reference to the conventional tenements of the said manors in the second schedule of the Act referred to (b).

And it is further (c) enacted, "That it shall be lawful for the Duke of Cornwall, his agents and workmen, and his lessees and their agents and workmen, and all persons whom the Duke of Cornwall shall in that behalf authorize, and their agents and workmen, to enter into and upon all lands or tenements of any tenure situate or being within or held of any of the said manors mentioned in the said first and second schedules hereunto annexed, all or any of the mines, minerals, stone, or substrata in, upon, under, or of which do or shall belong to the Duke of Cornwall as hereinbefore is declared and provided, and to search, dig for, open, and work the same mines, and get, carry away, and dispose of the same minerals, stone, or substrata, and to erect all such buildings, steam, and other engines, and machinery and things, and sink and make all such pits, shafts, levels, adits, air-holes, tram and other roads, and other works, and to take from the said lands and tenements sufficient stone, lime, and slate, for such buildings and works, and take and use and divert all such water, and take and use all such room for ore and rubbish and other things, and do all such other acts and things upon, under, in, and about the aforesaid lands and tenements, as shall be necessary or convenient for working the same mines, and getting, washing, dressing, rendering merchantable, carrying away, and disposing of the same minerals, stone, or substrata, he, the said Duke of Cornwall, or his lessees, or the persons authorized by him as aforesaid, as the case may be, making to the persons entitled to the surface of such lands or tenements, or to such water, adequate compensation for the damage which shall have been done or occasioned by the exercise of the rights, privileges, and easements aforesaid, and making to the persons entitled to the same adequate compensation for the materials so taken as aforesaid, pro-

Duke's title to work minerals.

Compensation to tenants.

(b) Sec. 54.

(c) Sec. 55; see also secs. 66-68.



vided, nevertheless, that no person shall be entitled to claim any compensation for damage to be done by the exercise of any of the rights, privileges, or easements aforesaid, unless such claim be made in writing before the expiration of six calendar months after such damage shall have been done, or where the entry or other act by which such damage shall be done shall be of a continuing nature, then before the expiration of six calendar months from the time when such entry or other act shall determine or cease. Provided also, that a notice in writing claiming compensation as aforesaid, given by or on behalf of the person entitled to receive the same, to the Duke of Cornwall, or other person by whom such damage shall be done, or to any agent or workman, who shall be employed by the Duke of Cornwall, or such other person, in the entry or other act by which such damage shall be done, shall be a sufficient claim for the purposes of this Act."

In case of differences respecting the amount of compensation, the same may be settled by two justices of the peace, or the vice-warden of the Stannaries, or by action in the superior courts (*d*). Notice before entry to search or work mines, and security for part of the compensation to become payable, for the damage to be caused by such search, must be given.

The claims of the Duke of Cornwall in respect of lands, manors, liberties or franchises, mines, minerals (*e*), stone, or substrata, to be barred after certain fixed periods (*f*).

"Provided always, nevertheless (*g*), and be it enacted, that nothing in this Act contained shall give the said commissioners any power to inquire or award as to any claims to mines or minerals, under or by virtue of the custom or supposed custom commonly called 'bounding,' or as to any claim, title, or interest known by the name of 'Tin Bounds;' but every inquiry and award by the said commissioners shall be made without any regard to the said custom or supposed custom of bounding, or any estate or

Tin  
bounds.

(*d*) Secs. 56-59; 63-66.

(*e*) Ibid. 60, 61, 62.

(*f*) Secs. 71-92.

(*g*) Ibid. 32.

interest acquired thereby, and without prejudice to any such custom or supposed custom, estate, or interest."

Observe that under and by virtue of the last-mentioned Act, awards were made by the commissioners appointed for that purpose, and by the 11 & 12 Vic. c. 83, entitled "An Act to confirm the Awards of Assessionable Manors Commissioners, and for other purposes relating to the Duchies of Cornwall and Lancaster," such awards were declared to be binding and conclusive upon her Majesty and the Prince (*h*), and to be final respecting the matters therein adjudicated upon. "Provided always, that if any irreconcilable discrepancy shall appear between the acreage of any tenement, close, field, or parcel of land as specified in any schedule, and the extent of the same as measured by the scale on the map of the manor to which the schedule relates, then the true extent and boundary of the same shall be ascertained by reference to the map, and not to the number of acres alleged in the said schedule to be contained therein.

11 & 12  
Vic. c. 83.

Confirma-  
tion of the  
awards.

"The lord or lords of the manor or lordship of Tywarnhaile Tyas having claimed, in right of their said manor or lordship a moiety of all tin mines, tin ore, tin dues, or tin toll throughout the lands awarded as the demesne or conventional lands of the manor of Tywarnhaile, and His Royal Highness the Duke of Cornwall having claimed a moiety of all the like mines, ore, dues, or toll throughout the lands within the manor or lordship of Tywarnhaile Tyas, it was enacted, that nothing in the awards contained should be held or construed to prejudice either of the said claims, or to disturb, vary, or impair such respective rights as aforesaid: Provided always, that it shall be lawful for His Royal Highness, his heirs and successors, and for the lord or lords for the time being of the said manor or lordship of Tywarnhaile Tyas, or the majority in value of such lords, by agreement in writing under the seal of His Royal Highness, his heirs or successors, and under the hands and seals of the said lord or lords, or such majority as aforesaid, such agreement to be made by His Royal Highness, his

Rights of  
lords of  
the manor  
of Tywarn-  
haile.

heirs or successors, of the one part, and the said lord or lords, or such majority as aforesaid, of the other part, to be enrolled in the office of the duchy of Cornwall, from time to time to agree upon and determine all questions now existing or which may at any time arise between His Royal Highness, his heirs or successors, of the one part, and the lord or lords for the time being of the said manor or lordship on the other part, relating to the said claims, rights, and interests, and define and settle such claims, rights, and interests, and to make such provisions and regulations for granting, demising, and working the said tin mines, ores, dues, and toll, and collecting, recovering, and dividing all profits or advantages accruing or arising therefrom, and generally for doing all matters and things incidental or relating to the premises; and every such agreement so made and enrolled as aforesaid, and every demise or grant made in pursuance thereof, shall be binding and conclusive to all intents and purposes whatsoever: saving always to all persons, other than His Royal Highness and the said lord or lords, and those claiming by, through, or under them, and other than the parties to any such agreement, demise, or grant, all such estates, rights, titles, interest, and claims, in, to, or upon the said last-mentioned lands, mines, ores, dues, or toll as they lawfully had at the passing of the Act."

Commuta-  
tion of  
manorial  
rights,  
4 & 5 Vic.  
c. 35.

By 4 & 5 Vict. c. 35, entitled "An Act for the Commutation of certain Manorial Rights in respect of Lands of Copyhold and Customary Tenure, and in respect of other Lands subject to such Rights, and for facilitating the Enfranchisement of such Lands and for the improvement of such Tenure," it is provided "that if any action or suit shall be 'depending' touching the right to or amount of any fines or other manorial payments or incidents (except mines and minerals), or any question shall arise thereon, it shall be lawful for the said commissioners, or assistant commissioner, to inquire into, hear, and determine such right, or amount, or question as aforesaid:" and it is further provided, "that if any decision shall directly or indirectly affect any right to mines or minerals, such decision, so far as it relates to any such right, shall be null



and void, and of no effect whatever at law or in equity" (i). By section 84 it is enacted, "That in aid of the reservation of the lord's rights in mines and minerals lastly hereinbefore contained, it shall be lawful for the tenants, upon any commutation or enfranchisement under this Act, to grant to the lord of the manor such rights of entry and other easements, in or upon and through their respective lands, as may be requisite for the purpose of enabling the said lord, or his agents or workmen, the more effectually to win and carry away any mines or minerals under the lands of such tenants or any of them; and that, for the purposes of such grant, it shall be sufficient, in the case of a commutation, to state the fact of such grant, and the consideration (if any) to be payable for the same, in the agreement for commutation; but in the case of an enfranchisement of lands (subject to the lord's rights in mines and minerals), such rights of entry and way, and other easements, shall be reserved and granted in the enfranchisement conveyance." The 99th section provides that the Act is not to extend to the duchy of Cornwall. But by 11 & 12 Vic. c. 83, s. 5, it is provided that certain provisions of the last-mentioned Act shall extend to the lands and possessions of the duchy of Cornwall, and accordingly it is enacted "that the provisions of the last-recited Act" (viz. 4 & 5 Vic. c. 35, s. 84) "enabling tenants to grant rights of way or entry and other easements to the lord of the manor in or upon and through their respective lands, for mining purposes, for enabling courts of equity to decree a partition of lands of copyhold or customary tenure, for enabling lords of manors or their stewards to hold customary courts although no copyhold tenant be present, and for enabling lords or their stewards to make, out of the manors and out of court, grants of land to be held by copy of court roll, for enabling lords or their stewards to grant admissions out of the manors and out of court, and for requiring every surrender, grant, admission, and every fact proved to the lord or steward at any court whereat a homage shall not be assembled to be forthwith entered on the court rolls, and determining that presentment by the

homage shall not be essential to the validity of an admission, shall extend and apply to the lands and possessions of the duchy of Cornwall, and to any enfranchisement of lands held as of the duchy manors to be effected under the powers given by any existing Act or Acts of Parliament, and to the stewards and tenants for the time being of such manors."

Limitation  
of actions  
and suits,  
23 & 24  
Vic. c. 53.

By 23 & 24 Vic. c. 53, provision is made for the limitation of actions and suits by the Duke of Cornwall in relation to real property. The Act (after reciting an Act passed in the ninth year of King George III., chapter sixteen, for limiting the right of the sovereign to sue, impeach, question, or implead any person, body politic or corporate, for or concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises), or for or concerning the revenues, issues, or profits thereof, and for quieting possessions and titles against the crown, the before-mentioned Act of 7 & 8 Vic. c. 105 (*j*), and that the provisions of the said Act for quieting titles within the county of Cornwall as against the duchy did not extend to any property, right, claim, or question of, to, or concerning navigable rivers, estuaries, ports, or branches of the sea, or the fundus or soil thereof respectively, or the shores between high and low-water mark thereof respectively) declares that "the provisions of the said Act of the ninth year of King George III., then applicable to Her Majesty, her heirs and successors, should extend and be applicable to the Duke of Cornwall, in like manner as if the same were re-enacted and the Duke of Cornwall were throughout mentioned or referred to where the 'King's Majesty' or 'His Majesty' is in the said Act mentioned or referred to, subject nevertheless as to the property and possessions included in this Act, to the provisions contained in sections 72 and 75 of 7 & 8 Vic. c. 105, above referred to, with respect to the property and possessions included therein (*k*).

(*j*) See ante, p. 119.

(*k*) The expression, "The Duke of Cornwall," in the said act, is by the fourth section to mean the present duke, his predecessors and successors,

and also her present Majesty, her predecessors and successors, for the time being entitled to the possessions of the duchy or the revenues thereof.

“Provided always, that the said Act was not to extend to the property or possessions in relation to which provision for the limitation of actions and suits and for quieting titles is made by the said Act of 7 & 8 Vic. c. 105, or affect the provisions of 2 & 3 Will. IV. c. 71, ‘for shortening the time of prescription in certain cases,’ or of 2 & 3 Will. IV. c. 100, ‘for shortening the time required in claims of *modus decimandi* or exemption from or discharge of tithes’” (*l*).

And by the 24 & 25 Vic. c. 62, entitled “An Act to <sup>24 & 25</sup> amend the Act of the ninth year of King George III., <sup>Vic. c. 62.</sup> chapter sixteen, for quieting Possessions and Titles against the Crown, and also certain Acts for the like object relating to Suits by the Duke of Cornwall,” it was enacted that the sovereign “shall not at any time hereafter sue, impeach, question, or implead any person or persons for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises), which such person or persons, or his or their or any of their ancestors or predecessors, or those from, by, or under whom they do or shall claim, have, or shall have held or enjoyed or taken the rents, revenues, issues, or profits thereof by the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof, by reason only that the same manors, lands, tenements, rents, tithes, or hereditaments, or the rents, revenues, issues, or profits thereof, have or shall have been in charge to Her Majesty or her predecessors or successors, or stood insuper of record, within the said space of sixty years, but that such having been in charge and such standing insuper of record, shall be as against such person and persons, and all claiming by, from, or under them or any of them, of no force and effect” (*m*).

The crown  
not to sue  
after sixty  
years by  
reason of  
lands  
having  
been in  
charge.

And after reciting the before-mentioned Acts of 7 & 8 Vic. c. 105, and 23 & 24 Vic. c. 53, it was declared, that the provisions of the said Act applicable to the Queen’s

To apply  
to actions  
by the  
Duke of  
Cornwall.

(*l*) Sec. 2.

(*m*) Sec. 1.



Majesty should extend and be applicable to the Duke of Cornwall, and to the said two last-recited Acts, in the same manner as if the Duke of Cornwall were mentioned or referred to where the Queen's Majesty is mentioned or referred to; and the Act is to be construed together with, and be deemed to form part of, the said two last-recited Acts (*n*).

The Act contains provisions respecting the answering of rents and profits of any lands by any other person by the space of sixty years next before the commencing of any proceedings for recovering the same or in respect thereof, and rights of all persons having reversionary interests are protected, and the Act is not to apply to existing suits or proceedings (*o*).

Title of the  
duchy to  
gold and  
silver.

Whether gold or silver belongs to the duchy or the crown is a question which the author does not think has yet been raised. The charter (*p*) makes no exception of the precious metals, or any other minerals whatsoever, and it does not appear that any exception was intended.

In the Great Case of Mines (*q*) it was said, "that words in the king's charters shall enure to a common intent, and shall not divest out of the king things of a high degree, or things which are annexed to the crown in point of prerogative. From whence it follows that the word 'mines' will be sufficient to convey base mines, but not mines royal, which belong to the king by prerogative;" and, again, royal mines are given to the king by reason of his "dignity-royal," "and he has them, not in his own lands in respect that he is possessor of the land, but in respect that he is possessor of the crown, and in that respect he has it alike in his own soil and in the soil of others; whence it follows that if he claims the soil he does not thereby alien this point of the prerogative of the crown in his own soil" (*r*). On the other hand, it was argued that when the king grants *omnes et singulas mineras*, unless royal mines pass thereby, nothing passes by those words, for base metals pass by the grant of the soil,

(*n*) Sec. 2.

(*o*) Secs. 3, 5.

(*p*) See Charter, ante, p. 108.

(*q*) Plowden, 335.

(*r*) Ibid. 332.

and, therefore, whatever mines belonged to the crown ought to pass, or else the words will be void (*s*). The word "mine" is only once mentioned in the charter (*t*), and then more in reference to "Stannary" than to mines in general, but it is also stated in the charter "lest hereafter in anywise it should be turned into doubt what or how much the same duke ought to have in the name of the duchy aforesaid, *we have caused all things in kind* (*u*), which we will to pertain to the same duchy, to be inserted in this our charter." Whether these expressions would be sufficient if the grant were to an ordinary subject, would not admit of much discussion if the arguments in "the Case of Mines" which we have quoted are to be considered of any importance. But perhaps there is some distinction to be drawn between the grant to an ordinary subject and one to a member of the royal family, he being also the heir presumptive to the crown. If, on the other hand, royal mines are part of the prerogative of the crown, they are inalienable by the king alone, and would not pass even to a prince of the royal house, or heir presumptive, without the sanction of Parliament. In the consideration of this question it must not be forgotten that the charter was granted by and with the consent of Parliament, and it would seem, therefore, to be a simple question of construction, whether or not royal mines were intended to pass by the grant.

Lastly, we remark, that we have already referred to an Act, 21 & 22 Vic. c. 109, for declaring and defining the respective rights of Her Majesty, and of His Royal Highness the Prince of Wales and Duke of Cornwall, to the mines and minerals in or under land lying below high-water mark within or adjacent to the county of Cornwall, and under the estuaries and tidal rivers within the same county, and under the open sea below low-water mark, adjacent to, but not in, or part of, the same county (*v*).

(*s*) Plowden, 331a.

(*t*) See ante, p. 109.

(*u*) See ante, p. 108.

(*v*) See ante, p. 96.

High seas  
and sea-  
shore.

## SECTION II.

## ALIENATION, LEASES, GRANTS, SALES, EXCHANGES.

*Comprising Leases on Lives—Leases generally, 24 Geo. II. c. 50; 33 Geo. III. c. 78; 3 Geo. IV. c. 78; 5 Geo. IV. c. 78; 5 Geo. IV. c. 103, s. 19; 1 & 2 Will. IV. c. 5; 1 & 2 Vic. c. 101; 5 Vic. c. 2, s. 2; 11 & 12 Vic. c. 83, s. 3; 23 & 24 Vic. c. 53. Ecclesiastical Leases. Grants for Charities, Schools, &c.—Cemeteries, &c. Sales and Exchanges generally, 7 & 8 Vic. c. 65; 25 & 26 Vic. c. 49. Certified Copies of all Instruments to be received in Evidence—Stamp Duties. General Management of the Duchy Possessions under 26 & 27 Vic. c. 49, including powers of Sale, Enfranchisement, Purchases, Leases—Forms of Conveyance. Acts of Duchy are Public Acts.*

THE possessions of the duchy being, as we have already remarked, in every respect inalienable, except with the consent of the British Legislature, several statutes have from time to time been passed for the management of the duchy estates, and for enabling the duke, his council, or the reigning monarch when there is no duke of full age, to effect sales, exchanges, and enfranchisements, to make grants for charitable and other purposes, and to grant licenses and leases for exploring mines and minerals within the duchy domains. We propose to refer to those Acts seriatim.

Under and by virtue of these Acts, some of the duchy lands have been leased for fixed terms of years, usually ninety-nine years, determinable upon the death of one or more lives of the lessee's nomination, but subject by custom to renewal upon payment of a reasonable fine. In the case of *Simpson v. Clayton* the question was raised what was a reasonable fine, and Chief Justice Tindal is reported to have said that, "a fine which falls short in amount of three years' annual value of the premises cannot, upon any principle of law, or analogy to cases which have any bearing upon the subject-matter of inquiry, be deemed unreasonable," and that rack-rent paid by actual occupiers was a fair criterion of the annual value. In that case a portion of the premises had been underleased, and a cove-

Leases on  
lives.



nant entered into to use due exertions to obtain a renewal of the lease, and it was further decided that the covenant might be apportioned so as to enable an assignee of part of the assigned premises to sue thereon (*w*). But the old system of granting leases for lives, or in reversion, or in commuting the greater part of the rent for fines, had considerably reduced the income from the duchy, and accordingly the council of the duchy, appointed in 1838, decided that the practice should be discontinued, and since that period no leases have been granted on lives, and in lieu thereof a fixed term of years has been substituted, life interests have been exchanged for holdings of a more certain tenure, and the old fines taken the more regular form of rent.

By 24 Geo. II. c. 50, the then king was enabled to make leases of the duchy lands either for one, two, or three lives, or for thirty-one years or under, or for some term of years determinable upon one, two, or three lives, and not above; the usual or a reasonable rent being reserved upon such leases. Leases generally.

By the 33 Geo. III. c. 78, the Prince of Wales was authorized to make leases and grants of offices, lands, and hereditaments, parcel of the duchy or annexed thereto, and for other purposes therein mentioned. The leases might be granted for three lives, or thirty-one years, or for building or improving wastes for ninety-nine years upon annual ground-rents; but no fines for granting such leases were to be taken.

By the 3 Geo. IV. c. 78, amended by 5 Geo. IV. c. 78, and 5 Geo. IV. c. 103, s. 19, his majesty was enabled to make similar leases of the said possessions, and by the 1 & 2 Will. IV. c. 5, His then Majesty was enabled to make similar leases, which said last-mentioned Act was revived and continued to Her present Majesty by 1 & 2 Vic. c. 101.

By the 5 Vic. c. 2 (session 2), His Royal Highness the Prince was enabled to grant leases of the duchy pos-

(*w*) *Simpson v. Clayton*, 4 Bing. N. C. 778 S. C. 1 Arnold, 299.

sessions, and by section 2 it was enacted, "that every such lease or grant so made, or to be made, of any such manors, messuages, parks, lands, tithes, tenements, or hereditaments in possession, shall be and shall be made for three lives or fewer, or for thirty-one years or under, or for some term of years determinable upon one, two, or three lives, and not above; and if such lease or grant be made in reversion or expectancy, that then the same, together with the estates in possession, do not exceed three lives, or the term of thirty-one years, and be not in anywise dispunishable of waste; and so as upon every such lease or grant there be or shall be reserved the ancient or most usual rent or more, or such rent as hath been reserved, yielded, or paid for such of the premises as are or shall be contained therein for the greater part of twenty years next before the making of the said lease or grant, such rent to be reserved, due and payable to such as have the inheritance or other estate of and in the said duchy; and where no such rent hath been reserved or payable, that then upon every such lease or grant there be or shall be reserved a reasonable rent, not being under the twentieth part of the clear yearly value of the manors, messuages, parks, lands, tithes, tenements, or hereditaments contained in such lease or grant; and where the subject-matter of such lease or grant shall be mines, minerals, or tolls, dues or royalties, in respect of mines or minerals, that then upon every such lease or grant there be or shall be reserved reasonable rent, payment, toll, due, dole, or dish, without taking or requiring any fine or fines whatsoever." This Act expressly authorizes leases of mines, minerals, tolls, dues, or royalties in respect of mines and minerals, a reasonable rent, payment, toll, due, dole, or dish without any fine being reserved. But so much of the said Act as provided that no fine shall be taken on leases of mines and minerals is repealed by 11 & 12 Vic. c. 83, s. 3; and where fines are taken provision is made by section 4 of last-mentioned statute for the investment of such fines.

The duke and his successors, and the crown, when there is no duke, may, by 23 & 24 Vic. c. 53, also grant leases

of any property which may become vested in the duchy, under and by virtue of the "Cornwall Submarine Mines Act, 1858" (*x*).

The consent of the prince must be obtained to leases granted of any part of the duchy possessions by ecclesiastical persons, under the Acts 5 Vic. c. 27, s. 9, and 5 & 6 Vic. c. 108, s. 23. Ecclesiastical leases.

By 5 & 6 Will. IV. c. 69, entitled "An Act to facilitate the Conveyance of Workhouses and other Property," the Duke of Cornwall is enabled by any grant to convey or exchange lands for other lands, for the purpose of the same being used for workhouses, or for other purposes relating to the relief of the poor. And by 20 & 21 Vic. c. 13, being an Act to facilitate the procuring of sites for workhouses, in certain cases provision is made for the execution of any such deed by the Duke of Cornwall, and which must be executed in accordance with the provisions of 1 & 2 Vic. c. 23. And by 1 & 2 Vic. c. 107, entitled "An Act to Amend and render more Effectual the Church Building Acts," lands of the duchy may be conveyed for the purposes of the said Church Building Acts, and for the other Acts therein recited (section 8). Also by 4 & 5 Vic. c. 38, s. 4, for sites for schools, which said last-mentioned Act is extended by 15 & 16 Vic. c. 49, and amended and defined by 7 & 8 Vic. c. 37, 12 & 13 Vic. c. 49, and 14 & 15 Vic. c. 24; and by 7 & 8 Vic. c. 65, the prince, his heirs or successors, out of the lands of the duchy may give, grant to, and vest in any person or body politic or corporate, any building proper to be used or converted into a church or chapel or parochial or district school, and any ground proper for the site of any church or chapel, or for a cemetery or burial-ground, or any house (with or without a garden) proper for the residence of the spiritual person who may serve any such church or chapel, or of the master or mistress of such school, and any ground proper for any such site as aforesaid. The same power is extended in a limited sense, so as to apply to dissenters (*y*). Grants to charities, schools, churches, cemeteries, &c.

By the 7 & 8 Vic. c. 65, the Duke of Cornwall is enabled Sales and exchanges generally.

(*x*) 21 & 22 Vic. c. 109; ante, p. 96.

(*y*) 26 & 27 Vic. c. 49, s. 36.



to sell and exchange lands, and enfranchise copyholds, and to purchase leases, parcels of the possessions of the duchy of Cornwall, and to purchase other lands, and directions are therein given for effecting any of such sales, exchanges, enfranchisements, or purchases. And in the second schedule to the said Act, forms of conveyances on sales, exchanges, enfranchisements, and purchases are given. By 25 & 26 Vic. c. 49, the prince is authorized on attaining his majority to complete the contracts entered into by his council, under the said Act of 7 & 8 Vic. c. 65, and to exercise for himself the powers and authorities given by the said Act to his council. And it is also provided that no person claiming under any deed or instrument by which any sale, enfranchisement, exchange, or grant shall be made or purport to be made under the authority of this Act shall be bound or concerned to inquire whether such sale, enfranchisement, exchange, or grant is in fact authorized by this Act or not, or whether it is or is not within the provisions and the true intent and meaning of this Act, but every deed or instrument by which any sale, enfranchisement, exchange, or grant shall purport to be made under the authority of this Act shall be good, valid, and effectual, as against His said Royal Highness, his heirs and successors, for the purposes for which the same shall have been executed (z).

Persons claiming by deeds made under this Act not bound to prove deeds.

Certified copies to be received in evidence.

Provision is made by the said Acts, 7 & 8 Vic. c. 65, respecting enrolments, and examined and certified copies being received as evidence of the original instruments, and by section 6 of 11 & 12 Vic. c. 83, those provisions are extended to all deeds, certificates, receipt, or other instrument relating to all the *lands* and possessions of the duchy.

Stamp duties.

By the 7 & 8 Vic. c. 65, s. 43, licenses, grants, or leases to search for, or work, or get mines, minerals, stones, or substrata belonging to the duchy, for a period not exceeding one year from the date of such license, grant, or lease, are exempt from the payment of stamp duty.

26 & 27 Vic. c. 49.

We must close this part of the work by referring to the recent Act of Parliament, 26 & 27 Vic. c. 49, under and

(z) Sec. 3 of 25 & 26 Vic. c. 49.

by virtue of which the duchy possessions will be mainly regulated for the future. Thereby the said Act of 5 Vic. c. 2, and the 4th section of the Act 11 & 12 Vic. c. 83, are repealed (*a*); and a seal, to be called "the seal of the duchy of Cornwall," which shall be held from time to time by the personage for the time being entitled to the possessions of the duchy, or by some person lawfully appointed to be the keeper thereof, is to be kept (*b*). The Duke of Cornwall is empowered (*c*), at any time within a period of thirty-one years from the passing of the Act, to dispose of, either by way of absolute sale, or for a limited period, or by way of enfranchisement of any copyhold or customary tenements, any part of the possessions of the duchy of Cornwall, and any sale, disposal, or enfranchisement may be made subject to any reservations, exceptions, and restrictions, and in consideration of either a gross sum of money or an annual sum, or partly of a gross sum of money and partly of an annual sum, and where such consideration shall consist either wholly or in part of an annual sum of money, the same is, in the case of an absolute alienation in fee, to be perpetual, and in case of an alienation for a limited period only, to be payable during the continuance of the estate or interest to be parted with, such annual sum to be issuing and payable out of and charged and chargeable upon the possessions which shall be the subject of such sale, disposal, or enfranchisement; and in determining the amount of such consideration, the circumstances attending any disputed right or claim, and the outlay, if any, which may have been previously made in reclaiming, building upon, enclosing, or otherwise improving the premises intended to be sold, disposed of, or enfranchised, may be taken into account, and an abatement or allowance made in respect thereof, as to the Duke of Cornwall shall seem fair and reasonable, and the aforesaid power of enfranchisement shall include the enfranchisement of copyhold tenements held for a life or lives, and authorize the conveyance of the fee simple of the freehold thereof.

The mode of carrying the sales into effect, the form of

(*a*) Sec. 1.

(*b*) Sec. 2.

(*c*) Sec. 3.

Regulation  
of duchy  
possessions.

Repealing  
5 & 6 Vic.  
c. 2, and  
sec. 4 of  
11 & 12  
Vic. c. 83.

Establishes  
the seal  
of the  
duchy.

Power of  
sale and  
enfranchisement.

assurance, and the remedy for recovering money payable under the sale, is pointed out by the statute (*d*).

Power to  
purchase  
lands.

The Duke of Cornwall is empowered at any time to purchase any manors, lordships, advowsons, messuages, lands; mines, minerals, tenements, or hereditaments in England in fee simple, or any copyhold lands or tenements of inheritance, the freehold of which shall be parcel of the possessions of the duchy of Cornwall, or any rents, pensions, annuities, rights of common, or mining, or other charges or rights; and all such manors, lordships, advowsons, messuages, lands, mines, minerals, tenements, and hereditaments, rents, pensions, annuities, rights of common and mining, and other charges and rights so to be purchased, are to be conveyed, released, or surrendered to the Duke of Cornwall, and the conveyance or other assurance thereof may be either according to the form for that purpose set forth in the schedule to the Act, or in any other form which shall be more convenient; and all manors, lordships, advowsons, messuages, lands, mines, minerals, tenements, and hereditaments which shall be so purchased, and shall not be extinguished by the conveyance, release, or surrender thereof, are, on the completion of the respective purchases thereof, to all intents and purposes, to form part and parcel of the possessions of the duchy of Cornwall, and be subject to the same limitations, provisions, powers, and authorities in every respect, including the powers and provisions in this Act contained, as the other possessions of the said duchy (*e*).

There is a provision for the settlement of disputed questions which may arise touching or concerning the boundary or extent of any of the possessions of the duchy, or the title to any property, or any right of common, right of way, water right, or other right whatsoever, being or reputed, or claimed to be, parcel of or appurtenant to the possessions of the duchy (*f*); and the Duke of Cornwall, on the repurchase or redemption of any such annual sum, or any part thereof, may, by deed under the seal of the duchy of Cornwall, release the whole; or, in the case of a partial repur-

(*d*) Secs. 4, 5, 8, 11, 17, 19, 20.

(*e*) Sec. 7.

(*f*) Sec. 18.



chase or redemption, a proportionate or other part of the land or hereditaments chargeable therewith, from all future payments of such annual sum, or part thereof, as the case may be, and from all claims and demands in respect thereof (*g*).

The duke, by deed under the seal of the duchy of Cornwall, may demise or grant any manors, messuages, parks, lands, tenements, or hereditaments for the time being, parcel of the possessions of the duchy (including mines and quarries, whether opened or not, with power to the grantee to work, get, carry away, and dispose of the minerals found therein, and to do all acts necessary or expedient for working, getting, carrying away, and disposing of the same minerals, or any of them), for any term or number of years not exceeding thirty-one years in possession, but not in reversion, so that upon every such demise, where the subject-matter thereof shall consist of land or property other than mines or minerals, there shall be reserved the full and fair annual rent of the property to be comprised therein, to be incident to the immediate reversion of or in the premises to be thereby demised without taking any fine or consideration in the nature of a fine for the granting thereof; and where the subject-matter of such demise or grant shall be mines or minerals, that then upon every such demise or grant there shall be reserved a reasonable amount of rent, royalty, dues, toll, or dish, without taking any fine or consideration in the nature of a fine for the granting thereof (*h*).

The duke may also, by deed under the seal of the duchy, demise any lands, tenements, or hereditaments for the time being, parcel of the possessions of the said duchy, for any term of years not exceeding the term of ninety-nine years in possession, but not in reversion, with a view to the improvement thereof by the erection of new buildings or the repair of existing buildings thereon, or in the case of open or unimproved or waste lands, by the enclosure or cultivation thereof, or otherwise, so as that upon every such demise there shall be reserved a fair annual rent, to be in-

cident to the immediate reversion of the premises to be thereby demised, without taking any fine or consideration in the nature of a fine for the granting thereof, and so that in every such demise there shall be contained a covenant on the part of the lessee for the execution or performance of the particular improvements in consideration of which such demise shall be granted (*i*).

Fines may be taken in special cases with the consent of the Treasury, and covenants in leases are to be as effectual as if the duke had the absolute estate in his possession (*j*).

But leases are not to be otherwise than for fixed terms of years except in certain cases. New leases may be granted on surrender of existing interests, and on a surrender of any lease, separate leases may be granted at apportioned rents (*k*), and the concurrence of under leases is not required on a surrender before obtaining a new grant (*l*). The severance of the reversion is not to prejudice the powers of re-entry (*m*), and the other conditions annexed thereto.

Deeds, &c.,  
to be  
enrolled.

Every deed or instrument whereby any manors, lordships, messuages, lands, mines, minerals, tenements, or hereditaments, rents, pensions, annuities, rights of common or mining, or other charges or rights, shall be purchased under the powers of the Act, or any of the possessions of the duchy shall be sold, disposed of, enfranchised, exchanged, leased, licensed to be demised, granted, charged, or released, and every agreement for reference or submission to arbitration under the powers of the Act, and every award made pursuant to any such reference or submission to arbitration shall within six months after the date thereof respectively be enrolled in the office of the duchy (*n*). The keeper of records is to enrol deeds in the Duchy-office in order of time, and to certify enrolment, and deeds so enrolled do not require enrolment in any other court of law. Certain enrolments may be made *nunc pro tunc* (*o*).

By section 34, it is provided that it shall be lawful for the

(*i*) Sec. 22.

(*j*) Secs. 23, 24.

(*k*) Secs. 25, 26, 27.

(*l*) Sec. 28.

(*m*) Sec. 29.

(*n*) Sec. 30.

(*o*) Secs. 31—33.

duke at any time and from time to time, by sign manual, warrant or otherwise, to nominate and depute any person to enter into and make any contract or agreement touching or concerning any matter or thing to be done under the authority of this Act, but the party claiming as against the duke under any contract or agreement relating to the possessions of the duchy is only to be entitled to enforce in equity by suit against the keeper of the records of the said duchy a specific performance of such contract or agreement, and the duke is not to be personally liable to any action, suit, or other proceeding in consequence thereof, or touching or concerning any other matter or thing done or purporting to be done under the authority of the Act, or for any omission or otherwise, and the keeper of the records of the said duchy shall be indemnified out of the revenues of the said duchy against the costs, expenses, and losses of and attending or incurred by any suit against him as aforesaid.

Power to  
appoint a  
person to  
enter into  
contracts.

By section 25 of the said Act of 7 & 8 Vic. c. 65, power is given to His Royal Highness the duke, his heirs and successors, to grant licenses to copyhold or customary tenants within any manors, parcel of the possessions of the duchy, to improve their tenements and demise the same in manner therein mentioned, and by section 27 of the same Act it is enacted, amongst other things, that no grant shall be made under the powers of that Act without such sanction and approval on the part of the Treasury as therein mentioned: But it is now provided that all licenses by section 25 of the said Act of 7 & 8 Vic. c. 65, authorized to be granted, may be made and granted by the steward of the manor of which the premises to which the same shall relate are parcel, in such manner as any license to demise may by the custom of such manor be made or granted; and that the power thereby given is not intended to diminish or prejudicially affect the power of granting licenses previously sanctioned by the usage or custom of the manor, and that the word "Grant" contained in section 27 of the same Act is not intended to apply to the grant of any license granted under the authority of the Act (*p*).

Licenses to  
copyhold  
tenants.



Interpreta-  
tion of  
terms.

The words "Possessions of the duchy of Cornwall," and the word "possessions" applied to the duchy of Cornwall, are to include regalities, hundreds, castles, honours, lordships, manors, advowsons, forests, chases, woods, parks, messuages, lands, buildings, rights of common, mines, minerals, rights of entry, or other rights in respect of mines or minerals, rentcharges in lieu of tithes, fixtures, services, rents, pensions, annuities, annual sums reserved on any sale, disposal, or enfranchisement made under the powers of this Act, rights, privileges, easements, possessions, tenements, and hereditaments whatsoever, whether in possession or reversion, parcel or reputed or claimed to be parcel of the duchy of Cornwall, or annexed to the same.

The word "minerals" are to include all minerals, whether metallic or not, stone, and substrata of every description (*q*).

The powers conferred by the Act upon the duke are to be exercised by the sovereign as guardian of any future duke who may be under age, and in any such case the sovereign may appoint commissioners to carry out the said powers for and in the name of the sovereign (*r*).

Existing  
powers.

Nothing in this Act contained is to take away, alter, or prejudice, further or otherwise than as the same are thereby expressly rescinded or altered, any powers or provisions contained in the said recited Act of 7 & 8 Vic. c. 65, the 7 & 8 Vic. c. 105, or "The Acts for the Enclosure, Exchange, and Improvement of Land," or any other Act of Parliament theretofore passed and then in force touching or concerning or which may in any way affect the possessions of the duchy or the revenues or management thereof, and not thereby expressly repealed (*s*).

Minerals  
under  
Enclosure  
Acts.

It is further provided that the powers vested in the Enclosure Commissioners for England and Wales by "The Acts for the Enclosure, Exchange, and Improvement of Land," for effecting exchanges of land, shall, as to any exchange affecting the possessions of the duchy, be deemed and construed to authorize a dealing for the purpose of such ex-

(*q*) Sec. 37.

(*r*) Secs. 38, 39.

(*s*) Sec. 40.

change with mines and minerals, and rights in respect of mines and minerals, either with or without any dealing with the ownership of the surface (*t*).

This Act may for any purpose be cited as "The Duchy Short title. of Cornwall Management Act, 1863" (*u*).

To the Act is annexed a schedule of forms of convey- Forms of convey-  
ance.  
ance, as follows:

1. Form of conveyance on sale in consideration of a gross sum of money, or on a free grant, and endorsements thereon.

2. Form of grant for a limited period in consideration of a gross sum of money, and endorsements thereon.

3. Form of conveyance on sale in consideration of an annual sum.

4. Form of grant for a limited period in consideration of an annual sum.

5. Form of enfranchisement in consideration of a gross sum, and endorsements thereon.

6. Form of enfranchisement in consideration of an annual sum.

7. Form of conveyance of any land or property on a purchase of the duke, with receipt to be endorsed thereon.

8. Form of grant of an annuity on the surrender of an outstanding estate to be charged upon the premises surrendered.

All Acts which affect the duchy possessions or revenues Acts of  
duchy  
are public  
Acts.  
are to be considered as public Acts, and documentary and other evidence, not usually admissible, have been admitted; for instance: A counterpart enrolment of a lease by the duke, without evidence of the loss of the original; An extent of crown lands found in the proper office, purporting to have been taken by a steward of the king's lands, following in its construction the directions of the statute 4 Ed. I., although not signed, on the presumption that it was taken under competent authority; Answers of tenants to interrogatories put to them at an assession court in the reign

of Elizabeth, without producing the interrogatories, which had been searched for and could not be found (*v*).

To what extent similar evidence would be admissible in favour of a private person, will be seen by reference to the authorities on that subject (*w*).

(*v*) *Rowe v. Brenton*, 8 B. and C. S. C. 13 L. J. Ch. 33; 19 L. J. Ex. 97; 737.

(*w*) *Humble v. Hunt*, 1 Holt, 602; *Daniel v. Wilkin*, 7 Ex. 429; *Hammond v. Broadstreet*, 10 Ex. 390; *Outram v. Morewood*, 3 East, 346; *Pipe v. Fulcher*, 28 L. J. Q. B. 12. *Duke of Beaufort v. Smith*, 4 Ex. 450;



## CHAPTER VI.

INTERPRETATION OF THE TERMS—MINES, MINERALS,  
AND QUARRIES.

*In Deeds, the Intention of the Parties and the Grammatical Sense usually prevail. Parol Evidence and the Customs of a District are admissible to explain the Terms. Mines, Lime-works, Salt-works, Clay-pits, Minerals (Stone a mineral), Quarries, defined. The Distinction between a Mine and Quarry. Scientific meaning of a Mineral—Metalliferous or Non-metalliferous—Local signification—Wales, Cornwall, Derbyshire.*

MINES, minerals, and quarries are terms which have given rise to much litigation, therefore it is proposed to consider the different meanings which may be attached to those terms under different circumstances and in different localities. In the Case of Mines (*a*), it was said, in argument, that there were two kinds of mines, viz.: mines royal, consisting of, or containing, gold or silver; and base mines, which consisted only of base metals or base substances, as copper, tin, lead, iron, or coals. In the Year Book (*b*) mines of coal, iron, and stone are mentioned; and in Viner's Abridgment, under title "Mine," a distinction is drawn between mines and pits; and it is there stated that a mine is not properly a mine till it is worked, but only a vein (*c*). Mines of metal, coal, "*or the like*," are mentioned by Coke (*d*); and alum mines are referred to in the Statute James I. c. iii. s. 11.

As the interpretation of these words generally arise out of exceptions and reservations made in deeds, it should be observed that, when any reasonable degree of doubt exists

Definition  
of mines,  
minerals,  
and  
quarries.

When used  
in deeds.

(*a*) Plowd. 333; ante, p. 128.

(*b*) 17 Ed. III. 7 b.

(*c*) Clavering v. Clavering, cas. Ch. temp. King.

(*d*) Co. Litt. 53 b.; Coke, 54 b.

in reference to them, the words of the exception or reservation, being the words of a grantor or lessor, will be construed favourably for the grantee or lessee, and against the grantor or lessor, as the case may be (*e*).

Intention  
of parties.

The intention of the parties, rather than the precise words, is also a governing principle in the construction of deeds "verba intentioni debent inservire," and "qui hæret in litera, hæret in cortice." This principle was recognised by Tindal, C.J., who said: "Whilst the intention of the parties ought to be our only guide to the interpretation of their deed, it must be their intention to be collected from the words of the instrument sealed and delivered by them. No surmise or conjecture of any object which any of the parties may be supposed to have had in view, can be allowed to have any weight in the construction of the deed, unless such object can be collected from the plain language of the deed itself" (*f*). And in the case of *Abbott v. Middleton* (*g*), cited in *Slingsby v. Grainger* (*h*), Lord Wensleydale confirmed the well received doctrine that the grammatical and ordinary sense was to prevail in the absence of exceptional circumstances.

Parol  
evidence.

In the case of *Smith v. Jeffryes* (*i*), Alderson, B., said: "Where you show that words apply equally to two different things or subject-matters, evidence may be adduced to explain which of them was the thing or subject-matter intended. Evidence of custom or usage will also be received to annex incidents to written contracts on matters with respect to which they are silent (*j*); but if the terms of the instrument are inconsistent with the custom, the contract must prevail" (*k*).

Custom  
of a  
district.

The custom of a district will also frequently be admitted in explanation of these and similar terms. *Rowe v.*

(*e*) *Earl of Cardigan v. Armitage*, 2 B. and C. 197; *Bullen v. Denning*, 5 B. and C. 842.

(*f*) *Earl Scarborough v. Savile*, 3 Ad. and Ell. 962. See also *Harris v. Ryding*, 5 M. & W. 66; *Stratton v. Pettit*, 16 C. B. 420.

(*g*) 7 House of Lords' Ca. 88.

(*h*) 7 House of Lords' Ca. p. 284.

(*i*) 15 M. & W. 562.

(*j*) *Myers v. Sarl*, 30 L. J. Q. B. 14, quoting *Smith's notes to Hutton v. Warren*. See *Leading Cases*, vol. i. p. 462, 4th edit.

(*k*) *Clarke v. Roystone*, 13 M. & W. 756.

Brenton (*l*) may be used in support of this proposition. In that case it was decided that where in each of several manors belonging to the same lord, and part of the same district there was a class of tenants answering the same description, and to whom tenements were granted by similar words, evidence of the customary rights which had been enjoyed by the tenants of one manor might be received to show what were the rights of the tenants in the other manor. And in the case of *Clayton v. Gregson* (*m*), it was held that evidence of the existence of a custom might be adduced in explanation of the term "level" used in a lease of coal mines; but the existence of the custom, although proved, was not to raise a conclusion of law that the covenanting parties used the term according to such custom, but only a presumption from which a jury might draw such a conclusion.

In the case of *Rex v. Alberbury* (*n*), it was argued that every excavation of the earth would not constitute a mine, otherwise, it was said, a gravel, or marl, or sand pit, would be a mine; but, to constitute a mine, it must be such as required skill and science in working, and which was effected by means of mechanical operations—that lime-rock was for the most part near the surface, and was simply worked by common labourers in the ordinary course of their employment, and therefore no mine. And Lord Chief Justice Kenyon seems to have adopted the argument in his judgment, wherein he is reported to have said that there was no pretence whatever for calling the lime-works in question, mines. The argument and judgment were recognised in the subsequent case of *Rex v. Dunsford* (*o*). Mines. Lime-works.

In the case of *Rex v. The Inhabitants of Sedgley* (*p*), where limestone was obtained and raised by sinking shafts perpendicularly down to the stratum which lay forty or fifty yards below the surface of the ground, the stratum worked by roads and gateheads, and the stone raised to the

(*l*) 8 B. & C. 758, post, p. 179.

(*m*) 5 Ad. & Ellis, 302; see also *Macdonald v. Longbottom*, 28 L.J. Q.B. 256; *Myers v. Sarl*, 30 L.J. Q.B. 9.

(*n*) 1 East, 534.

(*o*) 2 Ad. & Ell. 568.

(*p*) 2 Barn. & Ad. 65.



surface by machinery or carried underground to a tunnel, the court held that the property was a limestone mine; and Lord Tenterden stated, that the existence of metal is

**Salt-works.** not necessary to constitute a mine, and salt-works and coal mines are referred to as not containing any metal, yet as being mines.

**Clay-pits.** In the case of *Rex v. Brettell* and another (*q*), clay-pits were held to be mines. In that case it appears excavations were made from whence glass-house pot-clay and fire-brick clay were extracted; a perpendicular shaft was sunk from the surface of the land for the purpose of raising the clay out of the strata, which was done by a steam-engine and other mining apparatus; the excavations were like those which were made for working coal and metallic mines; and the mode of raising the clay was the same as that used in a coal mine. Lord Tenterden, in delivering judgment, said, he saw no reason to depart from the opinion he had pronounced in *Rex v. Sedgley* (*r*); the only difference between that and the present case consisted, he said, in the character of the commodity obtained, the mode of obtaining it was the same. "Now that case established that, in order to determine whether an excavation in the earth constituted a mine or not, we are to look to the mode in which the article is obtained, and not to its chemical or geographical character." Here, as in *Rex v. Sedgley*, the substance is obtained by what, in the ordinary, and indeed in every, sense of the word, is *mining*; that being so, these clay-pits are *mines*.

**Mineral.** An explanation of the word mineral was given in the case of the *Earl of Rosse v. Wainman* (*s*), where it appears that by an Enclosure Act 53 Geo. III. c. 18, certain waste lands, the soil of which belonged to the lord of the manor, were enclosed and allotted to commoners. The Act, which recited the lord's title, reserved to the lord all mines and minerals of what nature or kind soever lying and being within or under the said waste lands, in as full, ample, and

(*q*) 3 Barn. & Ad. 424; s.c. 1 L.J. N.S. M.C. 46.

(*r*) See ante, p. 145.

(*s*) 14 M. & W. 859; s.c. 15 L.J. Exch. 67.

beneficial a manner to all intents and purposes as he could or might have held or enjoyed the same in case the said Act had not been made; and it was held that the reservation clause must be construed with reference to the title of the lord to the whole of the soil; and, inasmuch as the object of the Act was to give to the commoners the surface for cultivation, reserving to the lord what it did not take away for that purpose, the word mineral must be understood, not in its general sense, signifying substances containing metals, but in its proper sense, as including all fossil bodies or matters dug out of mines, that is, quarries or places where anything is dug; therefore, that the clause reserved to the lord the right to the stratum of stone in the enclosed lands. The above-mentioned judgment was affirmed upon a special case stated in the cause (*t*). Stone, a mineral.

In the case of *Micklethwait v. Winter* (*u*), it was decided that “coals or *other minerals*” included stone; in that case it appears that a common had been enclosed under the Act 33 Geo. II., and that there was a power contained in that Act for the lord of the manor to enter upon any of the enclosed lands for the purpose of digging “any coals or other minerals,” but there was no clause in express terms reserving the mines and minerals; nevertheless, the judges held that the Act by necessary implication reserved to the lord his right to the mines and minerals under the land so enclosed, and that “stones taken from quarries and separated from other stones were *minerals* in the ordinary sense of the word.”

But the terms, mines, minerals, and quarries, have received a very marked explanation in the still more recent case of *Darvill v. Roper* (*v*), wherein Kindersley, V.C., is reported to have said, “With regard to the term ‘mines and minerals,’ there can be no doubt that these words may be used in several different senses. As to the term ‘mines,’ Mines. if there were no other word used, I do not think there could be any fair doubt of its meaning. The question is,

(*t*) 2 Exch. Rep. 800.(*u*) 6 Exch. Rep. 644; s.c. 20 L.J. Exch. 313.(*v*) 24 L.J. Ch. 779.

Quarries.

whether a mine and a quarry mean the same thing. According to the ordinary meaning of the word 'mine,' I apprehend it does not include a quarry. The definition does not depend on the nature of the fossil obtained, but on the mode in which it may be worked (*w*). Some minerals may be worked by means of mining, others by means of quarrying; and, in this case, the limestone was worked by quarrying. They were not, in fact, limestone mines, but limestone quarries. That which is worked by mines is by a process of working underground without disturbing the surface; and when limestone is so worked, then it is a limestone mine. It is clear to me that the most accurate distinction between mines and quarries is, that where you are working *sub dio* after having removed the surface so as not to leave any roof, that is what is called quarrying. Mining is when you begin on the surface and, by sinking shafts, you work underground in a horizontal direction, making a tunnel as you proceed, and leaving a roof overhead.

Minerals.

Scientific meaning.

"As to the word 'mines,' therefore, I do not think there would be much difficulty. But it is more material here to consider the word 'mineral,' and ascertain in what sense that word may be used. Now, one sense is that in which it is used by scientific mineralogists, professors of science; and there is the testimony of several gentlemen of eminence, who state that the scientific meaning of the word is 'any crystalline or earthy substance, whether metalliferous or otherwise, which exists in, or forms part of, the earth, and which may be worked by means of a mine or quarry.' The objection in the present case to giving that meaning to the word is, that every portion of the soil, not only stone, metal, granite, and ironstone, but all the gravel and every pebble, even to the very substance of the loam or mould which forms the soil, though of vegetable formation, would be included. Now, it is impossible to attribute that meaning to the parties, for, according to such an interpretation of the term, they could have intended to partition no particle of the soil, but merely the *vestimenta terræ*; and, therefore, without controverting the correctness of the



definition of those scientific gentlemen, I am satisfied that it is not the sense in which the term is used here. The word 'mineral' is, no doubt, used very commonly in the sense of metalliferous, and that is the meaning which, perhaps, it was intended to have in this case; but the plaintiff contends that that is impossible, because it follows the words 'mines of lead or coal;' and though lead is metalliferous, coal is not, and therefore you cannot confine the meaning to metalliferous substances. A third meaning to the word is, all crystalline or earthy substances dug out of the earth by means of a mine, and this definition exactly corresponds with the etymology of the word 'mineral.' According to Dr. Johnson's and other dictionaries, indeed, it is very clear that the word 'mineral' must have been derived from the word 'mine.' A fourth definition is that which may be derived from local usage; and upon this point a number of persons who are working engineers have given evidence. Those gentlemen say, that the general meaning attached to the word 'mineral' throughout the counties of Flint and Denbigh is 'metalliferous ores,' and that in leases, where minerals are reserved, it is never contemplated that limestone should be worked, and that a contrary practice would have the effect of creating a revolution in the customs of the country. On the other hand, there are several witnesses who hold a totally different opinion, and state that there is no such meaning to the word. Now there are quite as many witnesses on one side as on the other, and they appear to have had equal opportunities of knowing the facts to which they depose; consequently, in such a diversity of evidence, it is impossible for me to guide myself to any rule settled by the practice of the country. There is, however, one settled rule for interpreting contracts, which is, that when there is any uncertainty as to the meaning of a word, you are to give it its primary or ordinary meaning." His Honour then commented upon several of the cases cited, alluding particularly to *Rosse v. Wainman*, *Micklethwait v. Winter*, *Rex v. Brettell*, and *Rex v. Alberbury*, for the purpose of showing that a mine and a quarry had never been considered one and the same thing, and said, "that the best

Metallic substance.

Non-metallic substance.

Local signification.

Wales.

definition of a mineral was that which was worked by means of a mine."

Another distinction between mines and quarries was stated by Chief Justice Monahan in *Brown v. Chadwick*, as follows: "A mine is a place where the substratum is excavated, but the surface is unbroken; whereas in a quarry the surface is open, and the material, as in the present case, exposed" (*x*). And in the case of the Countess of Listowel *v. Gibbings* (*y*), it was held that "the word 'mine' usually imports a cavern or subterraneous place containing metals or minerals, and not a quarry; and that 'minerals' ordinarily mean metallic fossil bodies, and not limestone." The case of *Darvill v. Roper* was cited, and followed.

Cornwall.

The exception and reservation of minerals made on the sale of some of the conventional tenements of the duchy of Cornwall has received a statutory explanation in the preamble of the statute 7 & 8 Vic. c. 105, and it is there declared to mean "metallic minerals" only; the same explanation is given of the term as and when used in the 18 Vic. c. 32, for extending the jurisdiction of the Stannary Court.

Derbyshire.

The terms "mine," "mineral," "veins," "ores," and "mineral property," when used in the Acts to define and amend the mineral customs of Derbyshire, have received another and different construction whenever those terms are applied to the districts where those customs prevail (*z*).

Undermining.

The subject-matter of this work is primarily mining proper, and, consequently, the foregoing definitions have been restricted to that branch of the subject; but, inasmuch as undermining is a corollary and necessary consequence of the main subject, numerous decisions will be found in reference to both. Observe, then, the distinction between mining proper, and caves or trenches dug under ground whereby the walls of a house or other superstructure become injured, which is undermining.

(*x*) 7 Ir. C.L. 108.

(*y*) 9 Ir. C.L. 223.

(*z*) 14 & 15 Vic. c. 94, s. 2; 15 &

16 Vic. c. 163, s. 2 (private Act), and post, "Derbyshire."

## CHAPTER VII.

## OWNERSHIPS IN MINES, MINERALS, AND QUARRIES.

## SECTION I.

## OWNERSHIPS IN GENERAL.

*Coke's doctrine: the Owner of the Surface, primâ facie, entitled to Minerals—Right to Minerals in Alluvial Lands—Minerals, when real, when personal estate—right to search for Minerals—distinct Ownerships may be established—consequences of distinct Ownerships—Statute of Limitations.*

LAND, according to Sir Edward Coke, implies, in its legal signification, an indefinite extent upwards, as well as downwards. “Cujus est solum, ejus est usque ad cœlum is (he says) the maxim of the law upwards; and downwards, whatever is in a direct line between the surface of any land and the centre of the earth belongs to the owner of the soil; so that the word *land* includes not only the face of the earth, but everything under it or over it.” He, therefore, who is entitled to the soil, is, according to the above doctrine, also entitled to the minerals beneath the soil (*a*). In freehold lands, the minerals *primâ facie* belong to the freeholder; in copyhold, commons, and waste lands, to the lord of the manor (*b*); but the title of the freeholder or lord of the manor is capable of being rebutted or qualified by evidence, showing distinct ownerships, or rights, in different persons; and, in this country, it not only frequently happens that the ownership in minerals is vested in one person, and the soil in another, but

Coke's doctrine.

Owner of surface *primâ facie* entitled to minerals.

(*a*) Co. Litt. 4 *a*, Shep. Touch. 90; 556; Curtis *v.* Daniel, 10 East, 273 Raine *v.* Alderson, 1 Arnold, 329; Barnes *v.* Mawson, 1 M. & S. 84 Case of Mines, Plowden, p. 310, Stat. Lewis *v.* Branthwaite, 2 B. and Ad. 1 W. & M. c. 30, 5 W. & M. c. 6, ante, 437; Rogers *v.* Brenton, 10 Q.B. 49, p. 88; 2 Black. Com. 18, Stephen's s.c. 17 L.J. Q.B. 34. edit. 1858, vol. i. p. 170, vol. ii. p.

(*b*) Post, pp. 171, 188.



Distinct  
owner-  
ships exist.

several distinct ownerships and rights to different minerals under the same surface, and even of qualified interests to minerals, both when distinct and blended with the ownership of the soil, do exist. For instance, the sovereign is entitled to all gold and silver, whether found in the demesnes of the crown, in the highways, or in the lands of private persons, situate in England or Ireland (*c*). The crown is also proprietor of the soil and of the minerals beneath the soil in the Forest of Dean, subject to the right of the "free miners" of that district to a grant from the crown to work the minerals upon payment of a royalty (*d*); and in those parts of Derbyshire where the mining customs prevail, Her Majesty, in right of her duchy of Lancaster, is the owner of the lead mines, whilst any of Her Majesty's "liege subjects" are entitled freely to enter upon and to work those mines without even the permission of the owner of the soil or of Her Majesty (*e*). In Scotland the crown has no right, not even to the precious metals, but only to a royalty payable out of the produce. The eldest son of the sovereign has an indisputable title to minerals under certain lands in Cornwall belonging to private persons (*f*). In the north of England one person is not unfrequently entitled to the iron, whilst another is entitled to the iron-stone; and two or more seams or strata of coal under the same lands are sometimes vested in different proprietors. In copyhold, commons, and waste lands, although the lord is owner of the minerals, he cannot, in the absence of custom to the contrary, disturb the surface of the copyhold lands without the consent of the copyhold tenants, or the commons without leaving sufficient herbage for the commoners (*g*).

These instances of distinct ownerships and rights are analogous to the civil law (*h*), and are much less injurious to the proprietors of the soil than the restrictions and qualifications of title imposed upon the lands of private persons in the other states of Europe, and are here noticed to prevent too much reliance being placed upon any abstract

(*c*) Ante, "Royal Mines," p. 72.

(*d*) Post, p. 102.

(*e*) Post, "Derbyshire customs."

(*f*) Ante, p. 107.

(*g*) Post, p. 171, 188.

(*h*) Ante, p. 17.

principle of law which may favour the owner of the surface.

Annexed to the *primâ facie* title of the owner of the surface is the right to minerals found on or underneath lands formed by alluvial; that is to say, in lands not suddenly derelict, but formed by the gradual and imperceptible accretion of the soil upon the sea or banks of rivers. In such cases the minerals, together with the land, belong to the owner of the soil next adjoining (*i*).

Alluvial lands.

Minerals unsevered from the land are part and parcel of the soil, and, as such, real estate; when severed they become personal chattels, and, as such, constitute personal estate (*j*).

Minerals, real or personal estate.

When the owner of an estate of inheritance is also entitled to the minerals, he has an absolute right to explore the earth and to search and dig for minerals, in the manner most beneficial to his own interests, regard only being had to the rights of adjoining proprietors—*sic utere tuo, ut alienum non lædas* (*k*); but this right of search, which *primâ facie* belongs to all persons seized of the inheritance, is in abeyance when the possession of the estate has been parted with. In such a case, the owner of the estate is precluded from entering into the lands and exploring mines during the period he is out of possession (*l*); on the other hand, the tenant in possession, not having any property or other right to the minerals, would commit waste by interfering with them, or otherwise disturbing the surface, consequently the minerals would thus be accessible to nobody without the mutual consent of both the tenant-in-fee and the tenant or lessee in possession (*m*).

Right to search for minerals.

But when the title to minerals is distinct from that to the soil, and vested in different persons, the owner of the minerals would, *primâ facie*, have no right to interfere

When property in minerals distinct.

(*i*) *Gifford v. Lord Yarborough*, 5 Bing. 163; *Lowe v. Govett*, 3 B. & Ad. 863; *Scrutton v. Brown*, 4 B. & C. 485; re *Hull and Selby Railway*, 5 M. & W. 331; *Ford v. Lacey*, 30 L.J. Ex. 351; 7 H. & N. 151.

(*j*) *Rowe v. Brenton*, 8 B. & C. 737.

(*k*) Post, Title "Lateral support."

(*l*) *Lewis v. Branthwaite*, 2 B. & Ad. 437; *Rowe v. Brenton*, 8 B. & C. 766; *Keyse v. Powell*, 2 Ell. & B. 132.

(*m*) Co. Litt. 54 *b*; *Manwood's case*, Moore, 101; *Astry v. Ballard*, 2 Mod. 193.

with the surface; but the law invariably accompanies a right to property with the necessary means for its enjoyment: *cuicunque aliquid conceditur, conceditur et id sine quo res ipsa non esse potuit* (*n*). And upon this principle the right to mines implies a right to work them, and to the use of so much of the surface of the land as may be necessary for the purposes of effectually carrying on mining operations: such as, for instance, the right to use all roads already formed upon the estate—to make any others which might be required—to erect buildings, steam-engines, and other machinery for draining the mine, or for working or drawing up the minerals (*o*). But if the right to work a mine is conferred by deed, and special provisions are inserted, as is usually the case, authorizing the erection of necessary buildings and machinery, and the making of proper and convenient roads, and the doing of other things necessary for the effectual carrying on of the mine, these and similar provisions, whilst they may limit the common law rights of the grantees, will be construed favourably for them and against the grantors. The question in such cases will be not only whether the doing a certain thing was absolutely necessary, but rather whether it is more convenient and capable of being carried out without injury to the soil (*p*). And when the right to minerals is distinct from the right to the surface, such an interest, in consequence of an omission to work the minerals, cannot be barred by the statute of limitations, 3 & 4 Will. IV. c. 27. This proposition was maintained in the case of *Seaman v. Vawdrey* under the old law (*q*), and since the statute of limitations, Blackburn, C.J., is reported to have said: "The question is, if mines or quarries be excepted to the grantor and his heirs in a grant in fee of the lands, is the grantor's right and title to them barred, extinguished, and transferred, if he omit to work or use them for twenty years? The defendant contends it is, for that the plaintiff

How far  
statute of  
limitations  
applies.

(*n*) Shep. Touch. 89.

(*o*) 1 Pres. Shep. 89; *Earl of Cardigan v. Armitage*, 2 B. & C. 197; 3 D. & R. 414; *Harris v. Ryding*, 5 M. & W. 60; *Hinchliffe v. Kinnoul*, 5 Bing. N. C. 24.

(*p*) *Dand v. Kingscote*, 6 M. & W. 174.

(*q*) 16 Ves. 390.



has not shown a right to enter within twenty years before his suit commenced. If this be the meaning of the statute, we must give assent to it, but it is an operation which, in the case before us, violates the meaning of the parties and annuls this contract; for their intention plainly was, that the right to the quarries should remain in the grantor, as if he had never executed the grant; and that in respect of their estate, he and his heirs should at all times possess and exercise a right to enter, search for, and carry them away. The excepting of the quarries severed them both as to estate and possession from the estate in possession in the lands, in both respects they became thereon separate and distinct; the grantor's estate and possession of the quarries remained unaffected; he retained them as he had them; they were never out of him" (*r*). And the above decision has since been affirmed in the case of *Tottenham v. Byrne* (*s*).

Where unopened mines under a copyhold were granted by the copyholder for a term of years to A and B, who did not work them within twenty years, A, at the time of the grant, being also tenant from year to year of the land, it was held that he was also in possession of the mines, although he could not work them as such tenant, that his possession inured for the benefit of B as well as of himself, and that any person claiming the mines under the grant would have a right to enter and work them within twenty years from the relinquishment of the possession of the land by A (*t*).

The question was again agitated in *Smith v. Lloyd*, and *Parke, B.*, in his judgment, said: "The question intended to be raised by the pleadings in this case is, whether, where more than a century ago, the owner of the fee-simple of a close, with a stratum of coal and other minerals under it, conveyed the surface to one under whom the plaintiff claims, reserving the minerals and a right of entry to get them to another under whom the defendants claim, that right of entry is barred by simple non-user for more than

(*r*) *M'Donnell v. M'Kinty*, 10 Irish L.R. p. 525; see also 1 Rep. of Commissioners on Registration, 1850, pp. 15, 17; *Cardigan v. Armitage*, 2 B. & C. 197.

(*s*) 12 Ir. Com. Law Rep. 376.

(*t*) *Keyse v. Powell*, 2 Ell. & B. 132, 645.

Statute of  
limita-  
tions.

forty years, no other person having worked or been in possession of the mines. We have not the slightest doubt that the title of the grantees of the mines is not barred in this case under the 3 Will. IV. c. 27, ss. 2 & 3, for we are clearly of opinion that that statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburne, C.J., in *M'Donnell v. M'Kinty* (*u*), and the principle on which it is founded (*v*); and the same principle was upheld in *Rimington v. Cannon* (*w*), in which case an estate tail having been discontinued by a feoffment made by the tenant in tail more than twenty years before his death, it was held that the issue in tail might bring his writ of formedon at any time within twenty years next after such death."

"Discontinuance of possession (says Lord St. Leonards), in the statute, means an abandonment of possession by one person followed by the actual possession of another person; for if no one succeed to the possession vacated or abandoned, there could be no one in whose favour or for whose protection the Act could operate. To constitute discontinuance, there must be both dereliction by the person who has the right and actual possession, whether adverse or not, to be protected; therefore, where land is conveyed with a reservation of the minerals, the title to the minerals is not barred, simply by the omission to work them for twenty years. The grantee of the land enjoyed the lands, but the possession of the land is not the possession of the mines, which become a distinct inheritance on the severance of the two estates" (*x*).

(*u*) 10 Ir. Law Rep. 514, and *supra*.

(*v*) *Smith v. Lloyd*, 9 Ex. 562, 571. (*x*) Lord St. Leonards's Real Pro-

(*w*) 12 C. B. 33.

perty, edit. 1862, p. 33.

## SECTION II.

## FREEHOLD LANDS.

**TENANT IN FEE-SIMPLE.**—Absolute Right to Mines and to Work for Minerals—Qualification of Right when there is an Executory Devise over.

**TENANT IN TAIL.**—Same Right as a Tenant in Fee-simple to Search for Minerals—Common Law power of Alienation—Enlarged by Statutes 3 & 4 Will. IV. cc. 74, 92; 18 & 19 Vic. c. 120.

**TENANT FOR LIFE.**—Distinction between Tenant for Life, without impeachment of waste and impeachable for waste—The former may open new Mines or Quarries—The latter can only work old ones—An old Mine or Quarry defined—New Seams of Coal worked by an old shaft is an old Mine. Power of Alienation, 19 & 20 Vic. c. 120.

**TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINCT.**—Dispunishable for waste, may therefore open Mines—cannot bar entail—For some purposes a Tenant for Life, 18 & 19 Vic. c. 120.

**TENANT BY THE CURTESY.**—Punishable for waste—cannot open new Mines—Power of Alienation, 18 & 19 Vic. c. 120—When Copyholds subject to Curtesy.

**TENANT IN DOWER.**—A Widow is dowerable out of all Mines, and whether opened by the Husband or the Heir—The recent case of *Dicken v. Hamer* reviewed—Dower when Mines are leased. Dower in Mines may be assigned, and by an Infant Heir.

**TENANT FOR YEARS—AT WILL—BY SUFFERANCE.**—cannot search for Minerals—When liable for Permissive and Voluntary Waste—A Long Term of Years—Lease on Lives renewable for ever—Nominal Damages will not be sufficient to support an Injunction to Restrain Waste.

**TENANTS IN COMMON—CO-PARCENERS—JOINT TENANTS.**—The effect of one only being in possession of Mines—When a Partition will be decreed—Right of each to work for Minerals—wilful Waste restrained—Action of Account by one against the other in respect of Waste, given by Statute—A Receiver may be appointed.

A TENANT in fee-simple possesses an absolute right to search for minerals and carry on mining operations upon his estate at pleasure; but a tenant in fee-simple, subject to an executory limitation over, in default of issue, would only seem to be in the same position as a tenant for life, punishable for waste, and will be restrained from committing equitable waste. In *Turner v. Wright* (y), however, it was argued that, there being an executory devise

Tenant in fee-simple.

(y) Johnson, 740; 2 De G. F. & J. Tudor's Real Property; Lord St. 234; 29 L.J. Ch. 470, 598; Lord L. v. Leonards's Real Property, 376. Duchess of Leeds, 2 Drew & S. 75;



over in a given event, the whole estate was to go over; by the whole estate the *minerals* must be included as a part of the inheritance; but the Vice-Chancellor (Wood) overruled the argument, and his judgment was affirmed on appeal. Although, therefore, it had been previously held by Lord Eldon, in *Stansfield v. Habergham* (z), that where there is an executory devise over of a legal estate, the court will not permit timber being cut down, such a doctrine cannot now be relied upon, and has, in fact, been overruled by the judgment in *Turner v. Wright*, wherein the Lord Chancellor said "that doctrine was not to be found in any text-book, and had never been acted upon" (a). The case of *Turner v. Wright* is an important one, and justifies our notice of an observation of the Vice-Chancellor which was not adopted on appeal. The Vice-Chancellor considered that a tenant for life impeachable of waste was in the same position as a tenant in fee-simple; but the Lord Chancellor made a distinction by saying "that although a tenant for life *sans waste* may fell and dispose of timber in his lifetime, the trees if not severed in his lifetime would belong to the reversioner; whereas the tenant in fee might, by sale and conveyance, give the purchaser an absolute interest in the trees without severance;" the same principle is applicable to minerals. Other minor points of distinction were referred to by the Chancellor.

Tenant in  
tail.

At common law, tenants in tail had also full power over the soil and the substrata, and they may still open and work mines without being answerable in equity for waste (b). At common law also, they might grant their rights to others for any estate commensurate with their own interests; if made for a longer period it was voidable only, and might be confirmed by their successors or the reversioner (c). And by statute 32 Henry VIII. c. 28, tenants in tail might make leases for certain limited periods, but that statute, so

(z) 10 Ves. 278.

(a) See 29 L.J. Ch. 600.

(b) Plowden, 248, 259, 437; Attorney-General v. Duke of Marlborough, 3 Mad. 498; Davis v. Duke of Marlborough, 2 Swanst. 108, 186.

(c) Co. Litt. 326<sup>b</sup>; Dyer, 46<sup>a</sup>, 51<sup>b</sup>, 95, pl. 40; Doe d. Southouse v. Jenkins, 5 Bing. 469; Mitchell v. Dors, 6 Ves. 147; Hanson v. Gardiner, 7 Ves. 305.

far as affects their estates, has lately been repealed (*d*). But now, by the 3 & 4 Will. IV. c. 74, a tenant in tail has full power by deed, but not by will, to dispose of, for an estate in fee-simple or any less estate (*e*), the lands entailed, whether freehold or copyhold (*f*), and thus to bar himself and his issue and all persons having any ulterior estate therein; but dispositions of the property by way of mortgage or for any other limited purpose are only to bar the estate tail so far as may be necessary to give effect to such partial or limited disposition (*g*). Every deed of freehold lands executed under the Act must be enrolled in Chancery, except leases, "for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack-rent, or not less than five-sixth parts of a rack-rent" (*h*); but deeds of copyhold lands need not be enrolled, but an entry thereof must be made on the court rolls (*i*). The expression "tenant in tail" is defined by the 1st section of the Act, and is declared by the 18th section "not to extend to tenants of estates tail, who by an Act passed in the 34 & 35 of Henry VIII., entitled an Act to embar feigned recovery of lands wherein the King is in reversion, or by any other Act, are restrained from embarrassing their estates tail." The Act does not include lands in Ireland, but similar provisions are inserted in the Irish Act 4 & 5 Will. IV. c. 92. Other enabling statutes have been passed, by virtue of which tenants in tail are enabled to grant leases, and to make limited dispositions of their property (*j*).

Tenants for life, without impeachment of waste, were at common law also endowed with an unlimited control over their estates, and might search for minerals at pleasure,

Tenant  
for life.

(*d*) See sec. 35 of 19 & 20 Vic. c. 120.

(*e*) Secs. 1, 15, and 40 of 3 & 4 Will. IV. c. 74.

(*f*) Sec. 50.

(*g*) Sec. 21.

(*h*) Sec. 41 of 3 & 4 Will. IV. c. 74.

(*i*) Sec. 54.

(*j*) See post, and 19 & 20 Vic. c. 120, ss. 2, 17, "Settled Estates," p. 280.

Tenant for  
life.

without being liable to an action for waste (*k*) ; but tenants for life, impeachable of waste, had no such rights, and could not explore the ground or otherwise injure or impair the inheritance (*l*). But a tenant for life, impeachable of waste, has a right to continue the working of mines and clay-pits already commenced where the preceding tenant for life has worked them ; and it would seem that if new shafts are necessary for the effectual carrying on of such workings, new shafts may be sunk, but where the preceding tenant for life had entirely abandoned the open mines, it is not clear that a subsequent tenant for life would be entitled to re-work them (*m*). And although a tenant for life, without impeachment of waste, is at liberty to open mines, yet a Court of Equity will interfere to restrain any wanton or malicious disturbance of the soil, or any act which would amount to a destruction of the inheritance (*n*). A tenant for life in remainder, unimpeachable of waste, cannot work mines before his estate has come into possession (*o*), and it is doubtful whether he can profit by any waste wrongfully committed by others before such possession (*p*). Where a tenant for life has committed waste by opening mines, the produce of the mines belongs to the remainderman, and the tenant for life is not even entitled to the interest of the

(*k*) Co. Litt. 53<sup>b</sup>, 54<sup>b</sup>, *Herlaken-den's case*, 4 Co. 443 ; *Saunders's case*, 5 Co. 22, *Pyne v. Dor*, 1 T. R. 55 ; *Downshire v. Sandys*, 6 Ves. 107 ; *Burges v. Lamb*, 16 Ves. 174 ; *Morris v. Morris*, 15 Sim. 505 ; and authorities in 2 Swanst. 145 ; *Lewis Bowles's case*, 11 Rep. 82<sup>b</sup> ; *Hob. 132* ; *Countess of Plymouth v. Lady Archer*, 1 Bro. C. C. 159 ; *Biggs v. Lord Oxford*, 1 De G. M. & G. 363 ; *Buckley v. Howell*, 30 L.J. Ch. 527 ; *Lord Lovat v. Duke of Leeds*, 3 D. & Sm. 75.

(*l*) *Bassett v. Bassett*, *Finch*, 189 ; *Aston v. Aston*, 1 Ves. Sen. 264 ; *Carew v. Carew*, 1 Abr. Eq. 221 ; 2 Inst. 299 ; *Perrot v. Perrot*, 3 Atk. 95 ; *Stoughton v. Leigh*, 1 Taunt. 411 ; *Dickin v. Hamer*, 1 D. & S. 284.

(*m*) Co. Litt. 54<sup>b</sup> ; *Saunders's case*, 5 Co. 22 ; *Vin. Abr. vol. xv. p. 401*, tit. "Mines ;" *Astry v. Ballard*, 2 Mod. 193 ; 2 Lev. 185 ; 3 Keb. 709, 761, 765 ; *Whitfield v. Bewit*, 2 P.

*Wms.* 240 ; *Lord Darcy v. Askwith*, *Hob. 234* ; *Hutt. 19* ; *Clavering v. Clavering*, 2 P. Wms. 388 ; *Sel. Ch. Ca. 79* ; *Stoughton v. Leigh*, 1 Taunt. 410 ; *Viner v. Vaughan*, 2 Beav. 466 ; *Ferrand v. Wilson*, 15 L.J. Ch. 41 ; *Spencer v. Scurr*, 31 L.J. Ch. 808.

(*n*) *Abraham v. Bubb*, 2 Freem. 53, 278 ; *Lewis Bowles's case*, 11 Rep. 83<sup>a</sup>, *Cooke v. Winford*, 1 Abr. Eq. 221 ; *Bishop of London v. Web*, 1 P. Wms. 527 ; *Vane v. Lord Barnard*, 2 Vern. 738, 1 Salk. 161 ; *Williams v. Williams*, 12 East. 209 ; *Micklethwaite v. Micklethwaite*, 1 De G. & J. 524 ; *Blake v. Peters*, 10 W. R. 826.

(*o*) *Lewis Bowles's case*, 11 Rep. 79 ; *Davies v. Davies*, 2 Ir. Eq. Rep. 415.

(*p*) *Gent v. Harrison*, *John. 517* ; *Rolt v. Somerville*, 2 Eq. Ab. 759 ; *Waldo v. Waldo*, 10 L.J. Ch. 312 ; *Lushington v. Boldero*, 15 Beav. 1.



produce, but if the remainderman adopts the acts of the tenant for life for other purposes, he may be debarred from enforcing his rights to that extent (*q*). Tenant for life

But although a tenant for life, punishable for waste, and other persons with limited interests are placed under restrictions, and have no right to dig for minerals, they may dig for gravel, marl, stone, clay, brick earth, or other similar substances for necessary repairs, or for the purpose of manure, without committing waste; and when in possession, it has been said that they or any one of them may dig for coal and iron, and other materials for their own use (*r*).

By a recent statute any tenant for life, even although he may have encumbered his estate or interest therein, may now make in certain cases absolute or partial alienation of his mineral property (*s*).

What would be regarded as open pits or mines in such a sense as to entitle the tenant for life to work them, was considered in the case of *Viner v. Vaughan* (*t*). Lord Langdale, in delivering judgment, said: "A tenant for life has no right to take the substance of the estate by opening mines or clay-pits, but he has a right to continue the working of mines and clay-pits where the author of the gift has previously done it; and for this reason, that the author of the gift has made them part of the profits of the land, but it does not follow that the tenant for life has a right to open old abandoned pits and mines, or to commence opening any mines or pits, which the author of the gift had merely made as preparations for opening. This, however, is the question in this case; it appears there were old pits which had not been worked for twenty years; it is stated that the last owner, for some purpose or other, had taken some clay out of them, and had made some preparations for working them, yet it is not alleged that these pits were in the course of working at the time of the testator's death; this therefore

What are open pits, or mines.

(*q*) *Gresley v. Mousley*, 8 Jur. N.S. 320.

(*r*) Co. Litt. 41<sup>b</sup>, 53<sup>b</sup>, 54<sup>b</sup>, 2 Roll. Abr. 816; *Cuddon v. Morley*, 7 Hare, 202; *Heydon v. Smith*, 13 Rep. 67; *Howley v. Jebb*, 8 Ir. C.L. 435.

(*s*) 19 & 20 Vic. c. 120, ss. 32, 41, and post, 280.

(*t*) 2 Beav. 466; *Astry v. Ballard*, 2 Lev. 185; *Freem.* 445.

was not an open mine in the course of working at the death of the testator." In *Spencer v. Scurr*, the Master of the Rolls said: "Clavering *v.* Clavering (*u*) did not confine the right to one seam. If there is a shaft by which you can work five seams, which are all let, and one only is at first worked, it cannot be said that when the lessee begins to work the other seams he is opening a new mine: it is substantially and practically the old mine. I concur in this, that if a man who has opened a mine for winning coal finds mines of lead or ironstone, that could not be got by means of the old shaft, that would be opening a new mine. But here the lessees were at liberty to open other seams, and to work any of the minerals; and I think this is only a repetition of the working of the old mine. I must therefore declare that the lease granted by the trustees is a renewal of the former lease, and that the plaintiff is entitled to a moiety of the rents and profits of the seams of coal worked" (*v*).

Tenant in  
tail after  
possibility.

The estate of a tenant in tail after possibility of issue extinct is of an amphibious nature, partaking partly of an estate tail and partly of an estate for life (*w*). Like a tenant in tail, he is punishable for waste, and may therefore search for minerals and work mines, subject, however, to the interference of a Court of Equity, as in the case of a tenant for life punishable of waste (*x*); but his interest is a personal one, and cannot be granted entire to another—his grantee would be merely a tenant for life (*y*). Moreover, a tenant in tail after possibility of issue extinct cannot bar the entail (*z*), but by a recent statute he has acquired a limited power of alienation, and for some purpose he is to be deemed a tenant for life (*a*); therefore, a tenant in tail of this latter description, and an ordinary tenant for life, may now make mutual exchanges

(*u*) 2 P. Wms. 388.

(*v*) *Spencer v. Scurr*, 31 L.J. Ch. 809.

(*w*) Co. Litt. 27<sup>b</sup>, 28<sup>a</sup>, 53<sup>b</sup>; 1 Inst. 301; *Ap-Rice's case*, 3 Leon, 241; *Williams v. Williams*, 12 East, 209, 15 Ves. 425; *Platt v. Powles*, 2 M. & S. 65.

(*x*) *Cooke v. Whaley*, 1 Eq. Ab.

400; *Abraham v. Bubb*, 2 Freem. 53; 2 Swanst. 172; *Williams v. Day*, 2 Ch. Ca. 32; *Garth v. Cotton*, 1 Ves. S. 524, 526; 1 W. & T. Leading cases, 559, 567.

(*y*) 19 & 20 Vic. c. 120, s. 1.

(*z*) 3 & 4 Will. IV. c. 74, s. 18.

(*a*) 19 & 20 Vic. c. 120, s. 1.

of mineral estates falling within the purview of that statute.

An estate by the *curtesy* is a life estate only, with all the incidents attached to an estate for life impeachable for waste, consequently he cannot open mines, and was incapacitated at common law from making any disposition of the minerals, which conferred a right to work and explore the ground; if the ground was opened, the reversioner would be entitled to prevent it by the same remedies as are adopted in other cases of waste; but the recent statute of 19 & 20 Vic. c. 120 (*b*), which has conferred powers of alienation on certain tenants for life, will generally enable a tenant by the curtesy to make a limited disposition of his interest (*c*). Copyholds are not subject to curtesy, except by custom (*d*).

Tenant  
by the  
curtesy

A widow is entitled to dower out of all mines, under any lands, of which the husband had at any time during the coverture an absolute undivided estate of inheritance, legal or equitable, or partly legal and partly equitable, provided no act was done in the husband's lifetime to defeat or prejudice her right (*e*). But it was adjudged, in the case of *Stoughton v. Leigh*, that the widow was not entitled to dower in mines which had not been discovered or opened during coverture (*f*); but the authority of that case must now be considered questionable, as minerals unsevered from the soil are real estate, and part and parcel of the soil itself (*g*), and as such, would, if not before, since the 3 & 4 Will. IV. c. 105, be subject to dower (*h*). Moreover, the rights of a dowress in mines opened after her husband's death have lately been discussed in the case of *Dickinson*

Tenant in  
dower.

Dower in  
unopened  
mines.

(*b*) See 32, 41.

(*c*) Co. Litt. 29<sup>a</sup>, 30<sup>b</sup>, Menvil's case, 13 Co. 23; Buckworth v. Thirkell, 3 Bos. & Pul. 652, note to Doe d. Andrew v. Hutton; Jones v. Davies, 31 L.J. Ex. 116; Jones v. Ricketts, 31 L.J. Ch. 753.

(*d*) 4 Rep. 22<sup>a</sup>, 30<sup>b</sup>.

(*e*) Fairley v. Tuck, 3 Jur. N.S. 1089; 27 L.J. Ch. 28.

(*f*) Co. Litt. 32<sup>a</sup>, 32<sup>b</sup>, 36; 53, Fitz.

N.B. 149<sup>a</sup>; *Stoughton v. Leigh*, 1 Taunt. 410; *Ray v. Pang*, 5 B. & Ald. 561; *Moody v. King*, 2 Bing. 447; *Rex v. Northweald*, Bassett, 4 Dow. & Ry. 276, 3 & 4 Will. IV. c. 105.

(*g*) *Hewlins v. Shippam*, 5 B. & C. 230; *Wilkinson v. Proud*, 11 M. & W. 33; *Wood v. Leadbitter*, 13 M. & W. 842, and title "License" in this work.

(*h*) Secs. 1-14.



Dower in  
unopened  
mines.

v. Hamer; and the judgment of Vice-Chancellor Kindersley in that case is full of valuable matter.

From the report, it appears that the husband died intestate, seized of real estates under which were seams of coal, but that no mines had been opened at the time of his death; and Kindersley, V.C., in delivering judgment, said: "What, then, are the rights of the parties to those coal mines? There could be no question as to their rights if the mines were originally opened mines; but what rights have they in unopened mines? The widow, the dowress, clearly cannot open the mines herself. She is, however, tenant for life of the one-third of the estate under which those mines are; and, although she cannot herself open them, she has the right of an ordinary tenant for life, and can say that the remainderman shall not open them without her consent. If that be so, as I take it to be when there has been an assignment, I do not see how, when the parties have gone on acting on the assumption of such an assignment of dower, the rights of the parties can be altered. But this case does not, in my opinion, depend upon these considerations, for we must look to what the parties have themselves done in this suit to affect their rights. Now this suit was instituted for the administration of the estate of Stephen Dickin, who died intestate. The plaintiff, an infant, was his only daughter and heiress-at-law; and her mother, the widow, is a defendant in the suit. The decree, on the hearing, directed an inquiry to be made by the Master whether Mrs. Dickin—who has since married a Mr. Hamer—was entitled to dower out of any, and which, of her late husband's real estates. To that inquiry the Master made his report in the affirmative as to all the estates. There was also an inquiry whether it would be fit and proper that the whole, or any and which part, of the estates should be let on coal-mining leases. Before the Master had made his report as to this inquiry, the suit came on upon further directions, when an order was made appointing Mrs. Hamer guardian of the plaintiff and the receiver in the suit, and directing her to receive the rents and profits of the estates in that latter capacity.

Nine years after that decree, on further directions, a provisional agreement was entered into by Mrs. Hamer for a lease of the property for coal-mining purposes. That was before the Master had made his report as to the propriety of the proposed lease; but he afterwards found in favour of such a lease, and, accordingly, on the 8th of May, 1856, the provisional agreement was ordered to be carried out. That object was effected by a lease made between Mrs. Hamer, as guardian of the infant plaintiff and receiver in the suit, the infant plaintiff herself, and the proposed lessee. The lease recited that the plaintiff was an infant; that she was the only child and heiress-at-law of the late Mr. Dickin; and it also recited the various proceedings in the suit, and contained an operative part, in this form: The infant plaintiff granted, demised, and leased the mines, &c., and Mrs. Hamer, as guardian, granted, demised, leased, and confirmed the said mines, &c., to the lessee. The lease also contained covenants, reservation of rents and royalties, and provisions for the payment of the income of the property, and all of which were made and entered into by, for, and between the infant plaintiff and the lessee. The question, then, really is, what was the effect of this transaction on the rights of the parties? If, at the time this arrangement was entered into, the widow had a right to say to the infant plaintiff or her lessee, 'You shall not work these mines under that one-third of the property in which I have a life-interest,' but did not say anything of the sort, what is the effect of her joining in this lease as she has? It was said in the argument that it was a mere concession on her part; but I think it cannot be so considered. This lease cannot be looked at in that light. Whatever was to be done was clearly to be done by, for, and on behalf of the infant alone, and no one else. The full and entire benefit resulting from this mining lease, as is evident from the reservations and the covenants being made for and with the infant plaintiff, was clearly intended to result to the infant. If it had not been so, and it had been intended on the occasion of this lease to give the widow any benefit under it, that would have been attended to and provided

Dower in  
unopened  
mines.

Dower in  
unopened  
mines.

for; but no such course was adopted. Moreover, it appears that the widow herself received the royalties reserved under this very lease, and paid them into court to her account, as receiver in the suit; clearly showing that she believed everything done with respect to these mines to have been for the benefit of the infant alone. My opinion therefore is, that the widow in this case is not entitled to any dower out of these royalties. As the question arose in chambers, there is no necessity to make any order at present as to the costs." Independently, therefore, of the special circumstances of this case, if the heir opens mines in land of which the widow is dowable, the heir thereby makes the proceedings thereof part of the profits of the estate (*i*), and the widow is entitled to one-third of the income of such proceeds, and not to a third of the corpus (*j*). If leases or licenses to work the mines, out of which the wife was dowable, had been made or granted by the husband during coverture, the right to dower nevertheless remained intact; but if such leases or licenses were made before coverture, the widow would only be entitled to her share of the renders under the lease or license, whether pecuniary or otherwise, according to the terms of the reservation.

Assign-  
ment of  
dower.

Dower in mines may be assigned by parol, notwithstanding the statute of frauds, and after assignment and entry, the freehold vests in the widow without livery of seisin (*k*). If the widow is refused her dower, she may proceed either by writ of summons (*l*) at common law or by bill in equity for an assignment thereof (*m*). The sheriff when called upon to make the assignment need not apportion a third part of each mine to the widow, but only a third in value of the whole of the mines, but the assignment must be equitable, or equity will grant relief (*n*). The widow, instead of her dower, may accept any other provision in lieu

(*i*) *Daly v. Beckett*, 24 Beav. 123.

(*j*) *Dickin v. Hamer*, 1 D. & Sm. 284; 29 L.J. Ch. 779; *Tudor's Real Property Cases*, 2nd edit. pp. 55, 69.

(*k*) Co. Litt. 32<sup>b</sup>, n. 1, 34*a*, 25*a*; *Rowe v. Power*, 2 B. & P. N. R. 134.

(*l*) 23 & 24 Vic. c. 126, s. 26.

(*m*) *Goodenough's case*, 2 Dick. 795; *Mundy v. Mundy*, 2 Ves. 128; *Harris v. Harris*, 11 W. R. 62.

(*n*) *Stoughton v. Leigh*, 1 Taunt. 411; *Hoby v. Hoboy*, 1 Vern. 218, s.c. 2 Ch. Ca. 160; *Thompson v. Watts*, 2 Johns & H. 291; 31 L.J. Ch. 445.



thereof, and her release will be binding upon her (*o*). An infant heir may assign dower, but in consequence of his disabilities, he will be protected against any excessive assignment (*p*); but persons under no disability must abide by their own act.

An estate less than a freehold is called a chattel-real, a term which implies that he who is entitled to it has an interest partaking both of real and personal estate; for whilst it concerns, or as the technical phrase expresses it, “savours of the realty,” it is, nevertheless, personal property in England and Ireland devolving upon the executor, and not upon the heir, whilst in Scotland it is real estate devolving upon the heir, and not the executor. Among those estates may be enumerated estates for years, at will, and by sufferance. An estate for years is assignable, but neither of the other two estates can be the subject of an assignment, because in the case of a tenant at will, he has no certain indefeasible estate, and as respects a tenant by sufferance, he is considered as having no estate at all, but a mere possession without privity (*q*). Like a tenant for life, a tenant for a term of years, unless restrained by covenant or agreement, may of common right take *estovers* or *botes* for fuel, repairs, manure, or for other necessary purposes of the land and premises, but he is also liable for any spoil or destruction which he may do to the premises during his tenancy, to the injury of the inheritance; he is therefore prevented from exploring the ground for minerals, or otherwise interfering with the surface, and he is generally liable for all kinds of waste; but it has been doubted whether he is liable for merely permissive waste. The liability of a tenant at will, and it is presumed of a tenant by sufferance also, is similar to that of a tenant for years, both as regards voluntary and permissive waste. In the case of *Harnett v. Maitland*, Mr. Baron Parke’s judgment on this question was as follows: “All the authorities” (he says) “are collected in the notes to *Greene v. Cole* (*r*), where it is

Tenant  
for years—  
at will—  
by suffer-  
ance.

(*o*) Dyer 91<sup>b</sup>, pl. 12.

(*p*) 1 Rol. Abr. 137, 681; *Gore v.*  
*Perdue*, Cro. Eliz. 309; *Fitz N. B.*  
148, G. H.; 149 B. contr.

(*q*) Co. Litt. 43<sup>b</sup>, 54<sup>b</sup>, 55<sup>a</sup>, 93<sup>a</sup>,  
57<sup>b</sup>, 270<sup>b</sup>; *Shelford’s Real Property*  
Stat. pp. 175, 182.

(*r*) 2 Saund. 252.

Tenant  
for years—  
at will—  
by suffer-  
ance.

stated as clear law, that at common law the action only lay against tenant by the curtesy, tenant in dower, or guardian, but that by the Statute of Gloucester, 6 Edw. I. c. 5, the action is given against lessee for life or years or tenant *pur auter vie*, or against the assignee of tenant for life or years for waste done after the assignment. We are all of opinion, however, that this declaration is defective on general demurrer, for not bringing the case within the class of persons who are liable for permissive waste, for want of an averment that the defendant was tenant for life or years, it being agreed on all hands that a tenant at will is not liable for permissive waste" (s).

If an estate is granted for a long term of years, and the grantee is made unimpeachable for waste, he would seem to have the same privilege of searching for minerals as a tenant for life unimpeachable for waste (t); but if a long term of years became vested in a person for life with limitations over, the tenant for life, as between himself and those in remainder, is only entitled to the ordinary privileges of a tenant for life impeachable for waste (u).

The proprietor of an estate leased for lives, renewable for ever, must not commit destructive waste, but he may commit meliorating waste; such is the law as it has been settled in the Irish courts (v), and there is no reason for doubting its applicability to England.

Where a lessee under a covenant not to commit waste has committed acts of waste, for which merely nominal damages would be given, the Court of Chancery will not entertain a suit against him founded on those acts of waste, unless it appears that he contemplates committing further waste (w).

(s) Harnett v. Maitland, 16 M & W. 262. See also Herne v. Benbow, 4 Taunt. 764; Jones v. Hill, 7 Taunt. 392; Gibson v. Wells, 1 B. & P. N. R. 290; Martin v. Gilham, 7 A. & E. 540.

(t) Garth v. Cotton, 1 W. & T. Leading cases; 1 Ves. 524, 546.

(u) Ferrand v. Wilson, 4 Hare, 344.

(v) Coppinger v. Gubbins, 3 J. & La. T. 397; Lord Waterpark v. Austen, 1 Jon. Ir. Ca. 627 n; Hunt v. Browne, Sa. & Sc. 178; Pim v. Davies, 1 Hog. 11; Conolly v. Lord Ely, 2 Moll. 515.

(w) Doran v. Carrol, 11 Ir. Ch. Rep. 379.

Although the estates and interests of tenants in common (*x*), coparceners (*y*), and joint tenants (*z*), are in many respects materially distinguishable from each other, they all have one common characteristic—viz. that they hold their lands *pro indiviso*, so that the interest and possession of each extends to every portion of the land. A feoffment executed by one would, under ordinary circumstances, bind the others, and if one only should be in actual possession, his possession is for many purposes the possession of the others (*a*); but now, by the Statute of Limitations 3 & 4 Will. IV. c. 27, s. 12, it is enacted: "That when any one or more of several persons entitled to any land (which includes minerals unsevered from the soil) or rent; as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them" (*b*).

They may agree to a partition (*c*), or if they cannot agree upon it, a Court of Equity will generally entertain a suit for a partition; but in a case where several persons were jointly entitled to several leases of a colliery worked in co-partnership, a partition at the instance of one co-owner was refused (*d*).

Any one of them may work mines, or grant or demise his interest to the others, or to strangers, and they may all concur in any act which affects the estate to which they are

Joint tenants, tenants in common, and coparceners.

Partition.

Right of each to work mines.

(*x*) Co. Litt. 180<sup>a</sup>, 188<sup>b</sup>, *Amies v. Skillern*, 14 L.J. Ch. 165.

(*y*) Co. Litt. 163<sup>a</sup>, 180<sup>a</sup>, Litt. ss. 241, 242; *Cooper v. France*, 19 L.J. Ch. 313.

(*z*) Co. Litt. 180<sup>a</sup>, 188<sup>b</sup>, 201<sup>a</sup>, *Murray v. Hall*, 7 C. B. 455.

(*a*) Co. Litt. 189<sup>a</sup>, 190<sup>b</sup>; *Doe d. Barnett v. Keen*, 7 T. R. 386; *Doe d. Gill v. Pearson*, 6 East, 173; *Doe*

*d. Reed v. Taylor*, 5 B. & Ad. 575, 583.

(*b*) *Woodroffe v. Doe d. Daniell*, 15 M. & W. 792; *Tidball v. James*, 92 L.J. Ex. 91.

(*c*) 4 Bac. Abrig. 503; *Doe d. Crosthwaite v. Dixon*, 5 Ad. & Ell. 834; *Darvill v. Roper*, 24 L.J. Ch. 779.

(*d*) *Wild v. Milne*, 26 Beav. 504.



thus peculiarly entitled (*e*); but wilful waste or destruction of the common property on the part of either parcener will be restrained at the instance of any of the others (*f*), or where the wrong-doer is insolvent (*g*), or occupying tenant to the others (*h*).

The Statute of Westminster, the second, gives one tenant in common, or joint tenant, an action against another, for acts which would be waste in a tenant for life or years (*i*); and if one receives more than his or her share of the profits of a mine, there is a remedy either by action of account, under the statute 4 & 5 Anne, c. 16, s. 27, or by bill in equity (*j*). Where an action can be brought, a bill for an account may also be sustained.

Where two tenants in common of a mine were entitled to the use of a shaft, constructed in land belonging exclusively to one of them, it was held that monies paid by a stranger for the use of that shaft also belonged to both tenants (*k*). And where one of two joint tenants is in possession of the whole of the property of an estate, a receiver will be appointed by the Court of Chancery at the instance of the other (*l*).

Mines held in coparcenary will descend in the usual course (*m*).

(*e*) 11 Rep. 49<sup>a</sup>, *Simpson v. Tellwright*, 2 Lutw. 1241; *Roberts v. Eberhardt*, 2 Eq. 780; Lord St. Leonards's Real Property Stat. p. 67; *Denys v. Shuckburgh*, 4 Younge & C. 42; *Durham and Sund. Ry. Co. v. Wawn*, 3 Beav. 119; *Henderson v. Eason*, 15 Sim. 303; *Thomas v. Thomas*, 19 L.J. Ex. 175.

(*f*) *Hole v. Thomas*, 7 Ves. 589; *Durham & S. Ry. Co. v. Wawn*, 3 Beav. 119; 2 Ry. Ca. 395; *Fraser v. Kershaw*, 2 K. & J. 496; *Goodwyn v. Spray*, 2 Dick. 667.

(*g*) *Smallman v. Onions*, 3 Bro. C. C. 621.

(*h*) *Twort v. Twort*, 16 Ves. 128.

(*i*) *Commis. Greenwich Hospital v. Blakett*, 12 Jur. 151.

(*j*) *Denys v. Shuckburgh*, *suprà*; *Bentley v. Bates*, 4 Y. & C. 182; *Henderson v. Eason*, 17 Q.B. 701.

(*k*) *Clegg v. Clegg*, 3 Giff. 322; 31 L.J. Ch. 153.

(*l*) *Holmes v. Bell*, 2 Beav. 298.

(*m*) *Lord Mountjoy's case*, Godb. 17; 1 And. 307; Co. Litt. 32<sup>a</sup>, 165<sup>a</sup>, n. 1, Bac. Abrid.

## CHAPTER VIII.

## OWNERSHIPS IN MINES, MINERALS, AND QUARRIES.

## COPYHOLD LANDS.

*Points of difference between Freehold and Copyhold Lands. Rights of the Lord and the Tenant to open new Mines and work old ones. When Trespass or Trover lies—Waste—Injunction. Prescription or Custom may qualify the rights of the Lord and the Tenant respectively. When Customs of one Manor may explain those of another Manor. Court Rolls. When a Copyhold Tenant is a competent witness to prove a custom. Enfranchisement—Voluntary and Compulsory—4 & 5 Vic. c. 35—6 Vic. c. 23—7 & 8 Vic. c. 55—15 & 16 Vic. c. 57—16 & 17 Vic. c. 57—21 & 22 Vic. c. 94; how Title to Mines, Minerals, and Quarries affected thereby.*

COPYHOLD lands, both as regards the quantity and extent of interest, the number and connexion of the proprietors, and the modifications to which they are subjected, resemble in many respects freehold lands, but there are some points of difference; for instance, copyholds cannot be entailed except by particular custom (*a*), and estates in dower or by the curtesy are not as of common right attached to them (*b*), though these estates may arise, and in fact do often exist (the former under the name of free-bench), by the special custom of particular manors (*c*); but estates for life or for years may be created out of them, and they have always been devisable by will, with as much freedom as freehold lands. The mode and forms of conveyance applicable to copyholds differ, and are much more complicated than those which relate to freehold lands, whilst the limitations of the former estates are exempt from some of the restraints imposed by the common law upon the latter.

(*a*) Co. Litt. 60<sup>b</sup>; 4 Rep. 23<sup>a</sup>; Haydon's case, 3 Rep. 21; Royden and Moulster's case, Godb. 367; Doe d. Spencer v. Clark, 5 B. & Ald. 458.

(*b*) Brown's case, 4 Rep. 318, 22<sup>a</sup>; Shaw v. Thompson, 4 Rep. 362, 30<sup>b</sup>.

(*c*) Brown's case, *supri*, Gilb. Tenures, 160.

Points of difference between freeholds and copyholds.

The Statute of Uses does not apply to copyholds, whilst it does to freeholds (*d*); and an estate in fee, or for life, may at common law be limited in future, or a fee limited upon a fee or a conveyance be made by the grantor to himself or to his wife in copyhold lands (*e*), but all those several limitations and conveyances of freeholds were void at common law, and can now only be partially effected. An estate-tail in copyholds, as well as in freeholds, may be barred in manner pointed out by the before-mentioned Act, 3 & 4 Will. IV. c. 74 (*f*).

Rights  
of the  
lord and  
tenant.

In copyhold or customary lands, the lord of the manor is owner of the minerals, but the tenant is in possession of them, and consequently, in the absence of prescription or custom to the contrary, the one cannot explore mines except with the consent of the other, although the tenant may continue the working of mines and quarries already opened (*g*); and both must concur in granting a license or lease to third parties except for a year (*h*). The authorities on the respective rights of the lord and the tenant are reviewed in the elaborate judgment of Lord Ellenborough in the case of *Bourne v. Taylor* (*i*). His lordship said, "The question for consideration is this: Has the lord of a manor a right to enter upon the copyholds within the manor, if there be mines and veins of coal under them, and bore for and work such mines and veins?" And in delivering judgment his Lordship is reported to have reasoned thus: "If such a right as is claimed exist, it is singular that it is not noticed in any of the books which treat of manors and copyholds; that it is now for the first time brought forward; that not a single instance is given of the exercise of it; and that with the single exception of

*Bourne v.*  
*Taylor.*

(*d*) 1 Watk. Cop. 100, 212; Royden and Moulster's case, Godb. 367.

(*e*) Boddington v. Abernethy, 5 B. & C. 782.

(*f*) Ante, p. 159; and 3 & 4 Will. IV. c. 74, ss. 50-54.

(*g*) Peachy v. D. of Somerset, 1 Str. 448.

(*h*) Co. Litt. 58<sup>b</sup>, Bishop of Winchester v. Knight, 1 P. Wms. 406; Townley v. Gibson, 2 T. R. 704; Lady

Montague's case, Cro. Jac. 301; Broadbent v. Wilks, Willes, 362; Grey v. D. of Northumberland, 17 Ves. 281; Bourne v. Taylor, 10 East, 189; Doe d. Foley v. Wilson, 11 East, 56; Lewis v. Branthwaite, 2 B. & Ad. 437; Keyse v. Powell, 2 Ell. & B. 145; M. of S. v. Gladstone, 30 L.J. Ex. 4; 19 & 20 Vic. c. 120, s. 43.

(*i*) 10 East, 201.



a dictum in *Rutland v. Greene*, what authorities there are upon the point are all against it. *Rutland v. Greene* (*j*) Rutland v. Green. was this; a person opened a mine upon his glebe: the patron moved for a prohibition to restrain him under the equity of the statute 35 Ed. I. statute 2; the court thought him entitled to open and work the mine; because, otherwise, none of the mines under glebe lands throughout England would be opened; but it being urged that this was the only way the patron had to try his right, the court granted a rule. Lidersin adds, 'The same law seems of a copyholder of inheritance. Quære bien.' Whether this were his own conclusion, or collected from what fell from the court, does not appear; but if any inference is to be drawn from it, it is that the copyholder may open the mine, not the lord. Levinz says nothing as to lord or copyholder; but Keeble says, 'Twisden conceived the lord may open a mine in a copyhold of inheritance.' Foster held it a trespass, and Keeling conceived he could not do it. The utmost extent, therefore, of this authority (*Rutland v. Greene*) is, that there is the obiter dictum of one judge, viz. Twisden, against the obiter dicta of two others, Foster and Keeling. In the *Bishop of Winton v. Knight* (*k*), Lord Chancellor Cowper held that if there were no custom to regulate it, neither a customary tenant, without license from the lord, nor the lord, without license from the tenant, could open and work new mines; in that case a customary tenant of the manor had opened a copper mine, and the lord filed a bill against him to account for the produce; and it being doubtful where there was not a custom which would protect the tenant, the Lord Chancellor directed the lord to bring an action of trover; but the custom appearing upon the trial not to be applicable, 'the court held that neither the tenant, without the license of the lord, nor the lord, without the consent of the tenant, could dig in these mines, being new mines' (*l*). In *Player v. Roberts* (*m*), J. N. was Bishop of Winton v Knight.  
Player v. Roberts. copyholder for life: the lord granted all coal mines within his manor for ninety-nine years to Dimery, who underlet

(*j*) 1 Keb. 557; 1 Lid. 152; and 1 Lev. 107.

(*k*) 1 P. Wms. 406.

(*l*) See also *Peachy v. D. of Somerset*, 1 Strange, 446.

(*m*) Sir W. Jones, 243.

to Player; Dimery's term was afterwards surrendered to the lord, but Player's interest was not extinguished: the lord opened new pits upon the copyhold, and took away the coal; upon which Player brought trover against him. Several points were moved, and the last was this: a man grants all his coal and coal mines within a manor (and parcel was copyhold for life) to J. S.: the lessee (this should be the lessor) enters the copyhold, and digs a new pit in the copyhold land during the life of the copyholder, and takes the coals and converts them to his own use; and the lessee of the coal mine brings trover against the lessor: and, by the court, so he may; for it is true that neither the lessee nor the lessor can enter upon the copyholder to dig the coals; for the copyholder shall have trespass for breaking his close and digging his coals; but when the lessor or lessee or a stranger enters, and digs the coals out of the pits, they belong to the lessee; and if any other take the coals, the lessee shall have trover: and upon the whole matter judgment was given for the plaintiff. In Gilbert's Tenures, 327, the Lord Chief Baron says, 'It seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines: neither can the lord dig in the copyholder's lands, for the great prejudice he would do to the copyhold estate.' Lastly, in *Townley v. Gibson* (*n*), it had been urged in argument that the lord of the manor was entitled to the mines under the copyholds, unless there were some custom to exclude him: and Buller, J., in delivering his opinion, said, 'I do not agree with the defendant's counsel that the lord may, unless restrained by custom, dig for mines on the copyholder's lands; but it is not necessary to consider that question here.' The authorities referred to are in point; and though they are dicta only, not decisions, they are the dicta of great men, and they correspond with the usage on the subject. Valuable as the supposed right is, there is not a single instance shown in which any lord has ventured to act upon it. The injury to the tenant would naturally have produced resistance on his part: the dicta above mentioned would have encouraged that resistance: a suit would have

*Townley v.*  
*Gibson.*

been the consequence, and the result of such suit must have been known in Westminster Hall; and as none such is known, it may fairly be presumed that a litigation of that kind has not taken place."

Upon a motion to dissolve an injunction which had been granted in the said case of *Bourne v. Taylor*, the Lord Chancellor said "there was nothing decided in the case as to the right, but only that a lord of a manor might be in the same situation with respect to mines as to trees—viz. he might have the property in them without being able to carry the minerals away." The property in mines is therefore in the lord, the possession of them in the tenant, and the latter may maintain trespass against a stranger, even against the lord himself (o), for breaking and entering the subsoil, even although no trespass should be committed on the surface: but the lord, not having the possession, could not maintain an action of trespass against a stranger. These points were decided in the case of *Lewis v. Branthwaite* (p), wherein Lord Chief Justice Tenterden is reported to have said: "It is well established that property may be in one person and possession in another; although, therefore, the property in a mine be in the lord, it does not follow that possession of it may not be in the copyholder. The property in trees is in the lord, yet the possession of them is in the tenant, and the latter may maintain trespass even against the lord for cutting down trees; unless, therefore, there be a distinction between trees on the surface of the soil and minerals below, the authorities cited as to trees are in point. No decision or dictum has been cited which warrants any such distinction. The general rule being that he who has the surface has the subsoil, it seem to me that the copyholder has possession of the subsoil, though he may have no property in it. The authorities cited to show that a lessee at will may take a release of the inheritance, whereby his estate is enlarged, or a confirmation for his life, upon which a remainder may be dependent, are in favour of this opinion. As, then, the possession of a mine is in the copyholder, and not in the lord, the former may

*Bourne v. Taylor.*

*Lewis v. Branthwaite.*

(o) *Mitchell v. Dors*, 6 Vesey, 147.

(p) 2 B. & Ad. 437.



Trespass.

maintain trespass for an entry upon it." And in the same case, *Littledale, J.*, further expounded the law. He said: "It is not disputed that a freeholder, or one holding under him for life, for years, or at will, has possession of the soil from the surface to the centre of the earth; but it is said that there is a distinction in this respect between a copyholder who is the tenant at will of the lord and a tenant of a freeholder; that as the absolute property in the freehold is in the lord, the property in the mine must be in him; and that as the plaintiff could not make use of these minerals, he cannot maintain an action against a wrong-doer for committing a trespass in the soil below the surface; but if the possession of the mine were not in the copyholder, it would be difficult to say to what extent any portion of the subsoil belonged to him. I am of opinion that although the property in the mine may be in the lord, he has not such a possessory right in it as to entitle him to maintain trespass against a wrong-doer; but the copyhold tenant has such a possessory right, and may recover substantial damages for any actual injury done to the surface, and nominal damages for a trespass committed below the surface. The authorities as to trees are in point" (*q*). But although the lord in such a case as last mentioned could not maintain an action of trespass, yet if the minerals are once severed from the land, the lord may maintain an action of trover either against the copyholder or a stranger (*r*). The above cases may be cited in favour of all tenants of copyhold and customary lands, whatever may be the extent of their interests, whether in fee, tail, life, or for years, having a possessory interest in mines.

Waste.

It has also been said that an action of waste will lie by a copyholder in remainder against a copyholder for life; but not by the lord of a manor against his copyhold tenants (*s*); this latter opinion, however, can hardly be maintained after the decision in *Parrott v. Palmer* (*t*).

(*q*) *Lewis v. Branthwaite*, 2 B. & Ad. 444. See also *Mardiner v. Elliott*, 2 Term Rep. 746; *Denn d. Joddrell v. Johnson*, 10 East, 266.

(*r*) *Player v. Roberts*, Sir W. Jones, 243; *Bishop of Winchester v. Knight*,

1 P. Wms. 406; *Bourne v. Taylor*, 10 East, 201; *Rowe v. Brenton*, Concanen's Rep. s.c. 8 B. & C. 737.

(*s*) See *Scriven*, 4th edit. pp. 424-444.

(*t*) 3 M. & K. 639.

An injunction will also be granted at the instance of a copyholder against his lessee (*u*), of a copyholder in remainder against a copyholder for life (*v*), and of the lord of a manor against the copyhold tenants (*w*) or their under-tenants (*x*).

But by prescription or custom the lord of the manor may have a right to take the minerals against the copyholder, or even against the crown; and a copyholder may have the same right against the lord (*y*).

Prescription and custom.

But the custom, whether claimed by the lord or the tenant, must be a reasonable one, and not destructive of the soil (*z*).

By custom also a copyholder may be entitled to take stone, marl, gravel, trees, or any other materials which may be necessary for the repairs of the premises in his occupation (*a*), and it is probable that a Court of Equity would sanction such a privilege without reference to custom (*b*); and recently (*c*) it has been held that a custom in a manor to take clay for the purpose of making bricks to be sold "off the manor" may be established. On this point Mr. Justice Wightman, in delivering judgment in the case of the Marquis of Salisbury *v.* Gladstone (*d*), is reported to have said "that the copyholders of inheritance may, without license from the lord of the manor, break the surface and dig and get clay without stint in, upon, from, and out of their copyhold tenements, for the purpose of making bricks to be sold by them off the manor, is good in law. It was contended for the plaintiff that such a custom was bad,

Marquis of Salisbury *v.* Gladstone.

(*u*) *Dalton v. Gill*, Cary, 89.

(*v*) *Caldwall v. Baylis*, 2 Mer. 408; Scriven, 426.

(*w*) *Attorney-General v. Vincent*, Bumb. 192; *Parrett v. Palmer*, 3 M & K. 639; Mit. Pl. 4th edition, 139; *Andrews v. Hulse*, 4 K. & J. 392.

(*x*) *Cuddon v. Morley*, 7 Hare, 202.

(*y*) Co. Litt. 122 a, Godb. 173; *Gilb. Ten.* 425; 13 Co. 68; *Hopkins v. Robinson*, 1 Mod. 74; *Bishop of Winchester v. Knight*, 1 P. Wms. 406; *Potter v. North*, 1 Vent. 383; *North v. Coe*, Vaugh. 251; *Rex v. Lord Yarborough*, 3 B. & C. 91; *Curtis v. Daniel*, 10 East, 273; *Hoyle*

*v. Coupe*, 9 M. & W. 450; *Rowe v. Brenton*, 8 B. & C. 766; *Marquis of Salisbury v. Gladstone*, 30 L.J. Ex. 3; 8 Jur. N.S. 625.

(*z*) *Hilton v. Lord Granville*, 5 Q.B. 701; s.c. Cr. & P. 294; *Broadbent v. Wilks*, Willes, 361; *Marquis of Salisbury v. Gladstone*, *supra*, and *post*, p. 179.

(*a*) Scriven, pp. 422, 428 n.

(*b*) *Heydon v. Smith*, 13 Rep. 68.

(*c*) *Marquis of Salisbury v. Gladstone*, *supra*; 6 Jur. N.S. 1209; 8 Jur. N.S. 625.

(*d*) 30 L.J. Ex. 4.

Profit  
à prendre.

as inconsistent with the right of the lord, who had an interest in the soil; and that the custom extended to taking away the soil itself, which the copyholder could, even by custom, have no right to do, because it was the lord's land, who might become entitled to the immediate possession of the copyhold tenements by forfeiture or escheat. We are, however, unable to draw any sound distinction between a custom for copyholders to take all the timber or trees, or all the minerals in their copyholds, and such a custom to take clay as that in question. I may observe that it appears to us that the cases of *profit à prendre*, or easements on the waste of the lord, or *in alieno solo*, have no application to the present question. A copyholder may by custom not only have a possessory but a proprietary right in the trees and minerals in his copyhold tenement. In the case of minerals, the taking is, in effect, a taking of a portion of the corpus of a copyhold tenement. There appears to be no doubt but that a copyholder of inheritance may not only by custom work old mines already opened, but that he may also by custom dig within his tenement for new ones, and, if successful, work them. The case of the Bishop of Winchester *v.* Knight<sup>(e)</sup> is an authority for the proposition, that by custom a copyholder of inheritance may open and work new mines. Gilbert, C.B., in his treatise on Tenures (p. 327), says that a copyholder of inheritance cannot, without a custom, dig for mines, obviously meaning that with a custom he could. In Scriven on Copyholds (p. 420), it is said that by custom a copyholder of inheritance may be entitled to the trees and mines in his copyhold. The plaintiff's counsel, in his argument, did not doubt but that a custom for a copyholder to have and work quarries and mines might be good, but contended that the surface must be left. But no case was cited to warrant such a conclusion. It may be that a mine, or mineral, or a quarry of stone might occupy the whole surface of the particular copyhold tenement, and that a general right to take stone or minerals would necessarily involve the taking

(e) 1 P. Wms. 406.



the surface. But in the present case there is nothing to show that the taking the clay would necessarily involve the taking of the surface. All the clay might be so situate as to be capable of being got at, as coals or other minerals. But, however that may be, we think there is nothing to show that such a custom as that in question is unreasonable or bad in point of law; and we may further observe that it is said, in *Scriven on Copyholds* (p. 26), that a custom is not unreasonable because it is prejudicial to or diminishes the lord's casualty profit as to escheat. For these reasons we think the defendant is entitled to our judgment." The above judgment was affirmed in the House of Lords (*f*).

The customs of one manor are not generally admissible to explain the customs of another manor, but there are some modifications of this rule. For instance, evidence has been admitted to prove that a custom may affect a whole district (*g*); and in *Rowe v. Brenton* (*h*) it was argued that evidence of the custom of one manor could not be admitted to prove the customs in another, unless both had been from time immemorial in the possession of the same person, and formed part of the same district; but Bayley, J., in reply to that argument, stated that when "we find a certain class of tenants existing from a very early period down to the present time, the terms of whose tenancy are expressed in language that leaves their rights in doubt, and when we find in each manor contemporaneous grants to the same class of tenants in the same words, may we not inquire what was enjoyed under those words in one manor in order to ascertain what was granted by them in another?" But in the case of *Marquis of Anglesea v. Lord Hatherton* (*i*), Lord Abinger, C.B., said: "I have always understood, from the practice of the courts in ancient times, which has not been altered to the present time, that there was no rule

When  
customs of  
one manor  
may ex-  
plain those  
of another.  
*Rowe v.*  
*Brenton.*

*Anglesea v.*  
*Hatherton.*

(*f*) *Marquis of Salisbury v. Gladstone*, 8 Jur. N.S. 625.

(*g*) *Somerset v. France*, 1 Stra. 653; *Ruding v. Newell*, 2 Stra. 956; *Fortes*, 41; *Dean and Ch. of Ely v. Warren*, 2 Atk. 189; *Roe v. Parker*, 5 T. R. 30; *Stanley v. White*, 14 East, 338;

*White v. Lisle*, 4 Madd. 224; *Rex v. Ellis*, 1 M. & S. 662; *Tyrwhitt v.*

*Wynne*, 2 B. & Ald. 554.

(*h*) 8 B. & C. 758.

(*i*) 12 L.J. Ex. 57; s.c. 10 M. & W. 218, 235, 237.

Rowe v.  
Brenton  
explained.

better established or more frequently acted upon than this, that the customs of one manor could not be given in evidence to prove the customs of another; because as each manor may have customs peculiar to itself, to admit the peculiar customs of another manor in order to show the customs of the manor in question, would be a very false guide for the purpose of leading to any such conclusion. If no such custom exist, or can be found in the manor in question, to show that such a thing existed in a neighbouring manor, would be to put an end to all questions as to the peculiar custom in particular manors, by throwing them open to the customs of all surrounding manors." And the Chief Baron, in commenting upon the case of *Rowe v. Brenton*, said that case rested "upon a ground perfectly distinct; that was not at all a question of the customs of the manor; it was a question of what was the nature of the tenure of the assessional tenants; whether they belonged to one manor or the other, they held under the same title. It was not a *manorial* title. Since that case, by modern Acts of Parliament, the nature of that title has, I believe, been settled; but it certainly did not originate in their copyhold interest; it apparently, and I believe really, originated in leases granted for seven years and renewable every seven years, and of one year renewable every year, by the assessor courts embracing the whole of what are called assessor manors. That gave an opportunity to say such was the *custom*, because at such a session such leases were granted in such a manor; and thus the judgment of the Court of Queen's Bench in that case did not relate to the tenure or the custom of the particular manor, but to the nature of the assessor tenure in all the manors, as ascertained from what was done in the one. Suppose there had been no manor at all, but in truth the land had been held under such assessor tenure, without being a manor; it would be evidence there in exactly the same manner as if it had been a manor. This shows that that decision has nothing to do with the question as to admitting the customs of one manor to prove the customs of another."

Court rolls. The court rolls of a manor are not strictly records, and

errors in them may therefore be shown to exist (*j*). These court rolls are evidence for the lord as well as for the tenant (*k*), but not for or against strangers (*l*); but entries of presentments are not evidence either for the lord or the tenants (*m*). A copy of a court roll under the hand of the steward, and certified copies verified by oath, are admissible in evidence (*n*), but entries of the steward made more than thirty years are admitted without further proof (*o*). And if the earliest court rolls are lost, and the loss is satisfactorily accounted for, the subsequent entries on the rolls will be admitted in evidence in support of a title by custom (*p*).

A copyholder, by endorsement of his name upon the record, is, under 3 & 4 Will. IV. c. 42, ss. 26, 27, a competent witness on behalf of any other copyholder for proving a custom to take stone to be used within the manor (*q*). When one tenant is a competent witness.

At common law, where the lord of the manor and the tenant had each an estate of inheritance in fee-simple, the copyhold tenement could be converted into a freehold, either by the lord conveying the freehold of the soil to the tenant, or by giving a release of his seignorial rights, and this was termed enfranchisement (*r*); but a conveyance from the copyholder to the lord did not work an enfranchisement, but only an extinguishment of the tenant's rights (*s*), and when a copyholder conveyed his interest to a stranger, under and by virtue of an Act of Parliament, authorizing a company to purchase, such a conveyance was held not to work a forfeiture, but to pass all that the tenant could transfer without the lord, and no more (*t*). Enfranchisement.

(*j*) *Snow v. Cutler*, 1 Keb. 567; *Brend v. Brend*, Fin. Rep. 254; *Burgess & Forster's case*, 1 Leon. 289; 4 Leon. 215; *Hill v. Wiggett*, 2 Vern. 547; *Doe d. Priestley v. Calloway*, 6 B. & C. 484.

(*k*) *Warriner v. Giles*, 2 Stra. 954; *Humble v. Hunt*, 1 Holt, 601; *Love v. Bentley*, 11 Mod. 134; *Parrott v. Palmer*, 3 M. & K. 638.

(*l*) *Attorney-General v. Hotham*, 1 Turn. & R. 217.

(*m*) *Irwin v. Simpson*, 7 Bro. P. C. 317.

(*n*) *Snow v. Cutler*, *suprà*; *Lee v.*

*Boothby*, 1 Keb. 720; *Chance v. Dod*, 2 Barn. 406; *Street v. Roper*, 12 Vin. 214; *Rowe v. Brenton*, 8 B. & C. 737, s. c. 3, Man. & R. 296.

(*o*) *Wynne v. Tyrwhitt*, 4 B. & Ald. 376.

(*p*) *Phillips v. Ball*, 29 L.J. C.P. 7.

(*q*) *Hoyle v. Coupe*, 9 M. & W. 450, 11 L. J. Ex. 258.

(*r*) 1 Watk. Cop. 362-8.

(*s*) *Bleverhassett v. Homberstone*, W. Jon. 41.

(*t*) *Dimes v. Grand Junction Canal*, 9 Q.B. 506, s. c. 16, L.J. Q.B. 107.



Enfranchisement.

4 & 5 Vic.  
c. 35.

Lords' rights reserved.

Tenants may grant rights of way and easements.

No freehold can now be turned into a copyhold estate, but in addition to the common law right of the lord and the tenant of copyhold lands to extinguish either partially or wholly their separate interests, and to convert them into freeholds, several recent Acts have been passed for the enfranchisement of copyhold and customary lands, which will gradually render the law respecting that species of tenure of less importance. By 4 & 5 Vic. c. 35, provision is made in some cases for the compulsory commutation of certain rights of the lord, and in others for the voluntary enfranchisement of such lands; and by section 13 of that Act, if it is expressly agreed upon between the lord and tenants, but not otherwise, the commutation to be made in respect of the rents, fines, and heriots thereafter to become due in respect of manors, may be extended to rights in mines and minerals, and after such commutation the lands are to be discharged from payment of such rents, fines, and heriots, and a fixed fine to be paid in lieu thereof (*u*); and by section 39, the commissioners thereby appointed, to hear and determine certain questions touching the right to, or amount of any fine, or other manorial payment or incidents, are precluded from making any decision which would directly or indirectly affect any right to mines or minerals. Other provisions are contained in the said Act, whereby the lord and tenants may effect voluntary enfranchisements of the lands (*v*), for enabling the commissioners to satisfy themselves of the title to the manor, and generally for carrying the objects of the Act into effect. The Act also contains special provisions respecting mineral rights, easements, and crown lands, all of which are material to the subject of this work. By section 82, it is provided that no commutation under the Act shall operate so as to affect any rights of lords of manors to any mines, minerals, or quarries, within or under the said lands and hereditaments, or any other manorial rights whatever, unless expressly commuted under the Act. And by section 84 it is enacted, that in aid of the reservation of the lord's rights in mines and minerals, it shall be lawful for the tenants, upon any commutation or

(*u*) Sec. 36.

(*v*) Secs. 56, 57.

Enfranchisement.

enfranchisement under the Act, to grant to the lord of the manor such rights of entry and way, and other easements, in or upon and through their respective lands as may be requisite for the purpose of enabling the said lord, or his agents or workmen, the more effectually to win and carry away any mines or minerals under the lands of such tenants, or any of them; and that, for the purposes of such grant, it is sufficient in the case of a commutation to state the fact of such grant, and the consideration, if any, to be payable for the same, in the agreement of commutation; but in the case of an enfranchisement of lands (subject to the lord's rights in mines and minerals), such rights of entry and way, and other easements, are to be reserved and granted in the enfranchisement conveyance. Section 97 provides, that the before-mentioned provision, for enabling tenants to grant rights of way or entry, and other easements, to the lord of the manor, shall extend and apply to manors and lands vested in Her Majesty, in right of her crown and the duchy of Lancaster, but not to the possessions of the duchy of Cornwall (*w*).

By the first section of 6 Vic. c. 23, enfranchisements may 6 Vic. c. 23. be made either wholly or partially, in consideration of an "annual rent in fee," and any commutation or enfranchisement may, in addition to the provisions of 4 & 5 Vic. c. 35, be made either wholly or partially, in consideration of a conveyance of lands, parcel of the manor, and be subject to any right to mines or minerals in or under such lands.

And by section 5 of 7 & 8 Vic. c. 55, it is provided, 7 & 8 Vic. c. 55. "that in addition and subject to the provisions of the aforesaid Acts, or either of them, any commutation or enfranchisement may be made wholly or in part, for the consideration of a conveyance of lands, or of any right to mines or minerals, although the said lands, or the said right to mines or minerals, so to be conveyed, shall not be parcel of or situate in or under the lands of the same manor, as the lands so to be commuted or enfranchised, provided that the said lands, or the said right to mines or minerals, in the opinion of the Copyhold Commissioners, can be conveniently

Enfranchisement.

held with the same manor, and are subject, so far as the difference of tenure may permit, to the same uses and trusts, as the lands so to be commuted or enfranchised shall be subject to, at the time of such commutation or enfranchisement, or to uses and trusts in correspondence with which the said lands shall be then settled at law or in equity; and that it shall be lawful for the person empowered by the aforesaid Acts to obtain such commutation or enfranchisement, to convey the said lands or rights to mines and minerals, to the person commuting or enfranchising the lands proposed to be commuted or enfranchised, and to his heirs, to the uses, and upon and for the trusts, intents, and purposes, to, upon, and for which the manor of which the lands commuted or enfranchised are parcel, shall be subject and held at the time of such commutation or enfranchisement; subject always, as to any leases to which such lands may be subject, to all the provisions of the last-mentioned Act in respect to lands therein permitted to be conveyed."

15 & 16  
Vic. c. 51.

The Act 15 & 16 Vic. c. 51, being an Act to extend the provisions of the three before-mentioned Acts and for the commutation of manorial rights, and for the gradual enfranchisement of lands of copyhold and customary tenure, gives further facilities for the enfranchisement of the said lands; and by section 48, it is enacted that no enfranchisement under that Act shall extend to, or affect, the estate or rights of any lord of any manor, or tenant, in or to any mines, minerals, limestone, lime, clay, stone, gravel, pits, or quarries, within or under the lands enfranchised, or within or under any other lands, or any rights of entry, rights of way and search, or other easements, of any lord or tenant, in, upon, through, over, or under any lands, or any powers which in respect of property in the soil might but for such enfranchisement have been exercised, for the purpose of enabling the said lord or tenant, their or his agents, workmen, or assigns, more effectually to search for, win, and work any mines, minerals, pits, or quarries, or to remove and carry away any minerals, limestone, lime, stones, clay, gravel, or other substances, had or gotten therefrom, unless with the express consent in writing of such lord or tenant;



and nothing in the said Act is to extend to any copyhold lands held for a life or lives, or for years, when the tenant has no right of renewal (*x*).

By 16 & 17 Vic. c. 57, s. 1, the before-mentioned Acts <sup>16 & 17  
Vic. c. 57,  
s. 1.</sup> are made applicable to lands held of Ecclesiastical Corporations aggregate and sole, and the provisions of those statutes and of this Act are to be read and construed as one Act (*y*).

All the before-mentioned Acts passed in the reign of Her present Majesty have been either wholly or partially repealed or amended by the 21 & 22 Vic. c. 94, as from the 1st of October, 1858, as will appear from the following provisions. By section 2, it is provided that the following Acts and sections and parts of sections of the Copyhold Acts are hereby repealed; that is to say, the whole of the before-mentioned Act of the 16th and 17th of Victoria, chapter 57; so much of the 11th section of the 4 & 5 Vic. c. 35, as follows after the words "substituted in the place of such lord, tenant, or other person;" the whole of the 2nd, 11th and 27th sections of the 15 & 16 Vic. c. 51; and all the provisions of the Copyhold Acts which authorize commutations by schedule of apportionment, and also all the provisions which authorize commutations by a schedule to be prepared by the steward, and also all the provisions which authorize enfranchisement by schedule of apportionment, and also all the provisions which authorize the charging of enfranchisement or compensation monies or the expenses of commutation or enfranchisements upon land. <sup>21 & 22  
Vic. c. 94.  
  
Repeal of  
former  
Acts.</sup>

The repeal of the above Acts and sections of Acts is not to affect any commutations or enfranchisements or charges already effected, or any rights or remedies attaching thereto, or any acts done in pursuance of the Act or provisions specifically repealed, or rights or remedies vested by or resulting therefrom (*z*); and it is further provided that the Copyhold Acts are not to extend to any manors belonging, <sup>Repeal not  
to affect  
Acts done.  
  
Ecclesiasti-  
cal manors.</sup> either in possession or reversion, to any Ecclesiastical

(*x*) Sec. 48.

(*z*) Sec. 3.

(*y*) Sec. 7, Act partially repealed.

Corporation, or to the Ecclesiastical Commissioners for England, where the tenant hath not a right of renewal, and provision is made for the application of consideration monies in cases where enfranchisements might have been effected under 14 & 15 Vic. c. 104 (*a*).

Mode of  
effecting  
compulsory  
enfranchisement.

“When any lord or tenant shall, under the provisions of the 15 & 16 Vic. c. 51, or this Act (21 & 22 Vic. c. 94), require the enfranchisement of any land held of a manor, he must give notice in writing (the lord or his steward to the tenant, or the tenant to the lord or his steward) of his desire that such land shall be enfranchised; and the consideration to be paid to the lord for such enfranchisement, and also the sum to be paid to the lord in respect of any fine or heriot as is mentioned in the 7th section, shall, unless the parties agree about the same, be ascertained under the directions of the Copyhold Commissioners, and upon a valuation to be made in manner” pointed out in the Act (*b*).

Award of  
enfranchisement.

“After the valuation has been made, or upon the receipt of the agreement of the parties, the Commissioners, having made such inquiries concerning the circumstances of the case as to them shall seem fit, and having duly considered the applications made to them by the parties, may frame an award of enfranchisement in the terms of the valuation, and in such form as they shall provide, and may confirm the same; and such confirmed award shall have the same force and validity for all purposes of enfranchisement or otherwise as a deed of enfranchisement now has under the provisions of the Copyhold Acts, or would have had under any provision of the Copyhold Acts which is by this Act repealed; and for all purposes of declaring the amount, nature, and particulars of the compensation, and for attaching thereto the remedies provided by the Copyhold Acts, the said confirmed award shall have the same force and validity as an award made by valuers or an umpire under the provisions of the Copyhold Acts: Provided, nevertheless, that nothing herein contained shall affect the right of the steward for the time being of any manor to receive such sum of money by way of compensation or otherwise as

he would have been entitled to if such enfranchisement had been effected by a deed of enfranchisement under the provisions of the Copyhold Acts or any of them: Provided also, that the commissioners shall, fourteen clear days before confirmation of any such award, serve a copy of the same in the form in which it is proposed to be confirmed upon the steward of the manor of which the lands to be enfranchised are held" (*c*).

"After enfranchisement, whether under the voluntary or compulsory proceedings of the Copyhold Acts, the owner of the lands so enfranchised shall, notwithstanding any reservation of mines or minerals in the said Acts or in any instrument of enfranchisement contained, have full power and right to disturb or remove the soil so far as may be necessary or convenient for the purposes of making roads or drains or erecting buildings or obtaining water upon the said lands: Provided always, that this shall not prejudice the rights to any mines or minerals, or to work and carry away the same, which were reserved by section 48 of the Copyhold Act, 1852" (*d*).

When owners of enfranchised lands may use the soil.

The Act contains provision respecting the mode of payment of the enfranchisement money to the persons entitled to the same (*e*); and also for charging any expenses of enfranchisement upon the manors or lands enfranchised (*f*); and in reference to priority of charges, and the recovery of all sums of money due in respect thereof (*g*). And in cases of difference between the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or either of them on behalf of Her Majesty in right of her crown and the tenants of any hereditaments to be enfranchised touching the amount of consideration money to be paid in reference thereto, the said matter may be referred to arbitration. Further provision is then made for the payment of compensation, and for finally carrying out the enfranchisements, and also in reference to any manor held in joint tenancy by the crown. The Act is to be taken and construed as part of the other Copyhold Acts before referred to in this chapter (*h*).

(*c*) Sec. 10.

(*d*) See section 48 of 15 & 16 Vic. c. 51, ante, p. 184.

(*e*) Secs. 18, 15-21.

(*f*) Secs. 22-32.

(*g*) Secs. 38, 34, 35.

(*h*) Secs. 41-50.



## CHAPTER IX.

## OWNERSHIPS IN MINES, MINERALS, AND QUARRIES.

## COMMONS, WASTE, AND ENCLOSED LANDS.

*Tyringham's Case.* Lord of the Manor is entitled to the Minerals, and may work Mines and Quarries. Commoners' Rights. Prescription—Custom. Mines pass on Allotment, unless reserved. Enclosure Acts—Mines and Minerals expressly provided for—Reservation of Rights of the Lord. When Ownership in Minerals distinct from the Surface, rights of the respective Proprietors, Lessees, and other Persons not to be affected by the Enclosure—Surface damage—Power to work Enclosed Lands.

Tyringham's case.

A RIGHT of common is a right which one person has of taking some part of the produce of the land which is vested in another. Like all claims of right *in alieno solo*, it must be definite and certain (*a*). Tyringham's case (*b*) is a leading authority, and the other authorities quoted in this work in reference to the rights of the lord and the tenant in copyhold lands are generally applicable to the rights of the lord and the commoner in commons and waste lands (*c*).

The lord's rights.

As in copyhold, so in commons and waste lands, the lord of the manor has the property in minerals, but in commons and waste lands the rights of the lord are more extensive than in copyhold lands; he may open mines without being liable for damage to the surface necessarily caused by such working (*d*); but the exercise of the right must be *bonâ fide* and without malice (*e*), and the rights of the commoners not improperly interfered with (*f*).

(*a*) Lady Wilson v. Willes, 7 East, 121; Clayton v. Corby, 2 Q.B. 815; 5 Q.B. 419; Bailey v. Stevens, 31 L.J. C.P. 226.

(*b*) 4 Co. 36<sup>a</sup>.

(*c*) See ante, p. 172.

(*d*) Bateson v. Green, 5 T. R. 411; Tyrwhitt v. Wynne, 2 B. & Ald. 554; Arlett v. Ellis, 7 B. & C. 366; Doe d. Dunraven v. Williams, 7 Car. & P. 332.

(*e*) Place v. Jackson, 4 Dow. & R. 318.

(*f*) Drury v. Moore, 1 Stark, 102; Badger v. Ford, 3 B. & Ald. 153; Hilton v. Lord Granville, 5 Q.B. 729; re Mill, Bart., and Her Majesty's Commis. of Forests, 18 C. B. 64, 70; Blackett v. Bradley, 1 B. & S. 940.

Custom may deprive the lord of the manor of the Custom. minerals (*g*), and he may lose his right by neglecting to assert it; he may also transfer his right to others by implication, as well as by express grant (*h*). The lord may also acquire by prescription a more extensive power to work minerals than he *primâ facie* possesses as owner of the soil (*i*), but in the case of *Blackett v. Bradley*, it was recently decided that the lord of a manor could not claim or have a prescriptive right to search for, win, and work the coal mines lying and being under commons and waste lands, without leaving a sufficient support for the lands in and under which the mines were situate, and without making or paying satisfaction for any injury caused by such working (*j*).

Commoners, although they have no interest in the minerals, may, nevertheless, acquire a right to dig for moners' rights. gravel and other materials necessary for repair of the premises (*k*), and a prescriptive right may be acquired for other purposes, but when derogatory to the lord's rights, it must be established by indisputable evidence (*l*).

But mines in commons and waste lands are not in the Mines nature of a royalty, and will pass on allotment, unless expressly reserved (*m*); if the lands allotted were freehold, pass on allotment, unless reserved. mines would also belong to the allottee; if leasehold, the rights of the lord and the lessee would remain as in ordinary cases; whilst if the lands were copyhold, the incidents of that estate would follow—viz. the lord would retain the property in the mines, whilst the tenant would have the possession; neither having any power to work them unless by mutual consent (*n*).

The saving clause in the Enclosure Act, 41 Geo. III. Enclosure Acts. c. 109, reserves the rights of all persons whose interests are

(*g*) Post, p. 177.

(*h*) Co. Litt. 122<sup>a</sup>; *Curtis v. Daniel*, 10 East, 273; *Barnes v. Mawson*, 1 M. & S. 77; *Doe d. Lowes v. Davidson*, 2 M. & S. 194.

(*i*) *Hilton v. Lord Granville*, 5 Q.B. 729.

(*j*) 1 B. & S. 940; 2 & 3 Will. IV. c. 71; post, "Prescription."

(*k*) *Duberley v. Page*, 2 T. R. 392;

*Shakspear v. Peppin*, 6 T. R. 741.

(*l*) *Clayton v. Corby*, 5 Q.B. 422; *Attorney-General v. Mathias*, 4 Kay & J. 579.

(*m*) *Townley v. Gibson*, 2 T. R. 701; *Doe d. Sweeting v. Hellard*, 9 B. & C. 789.

(*n*) Ante, p. 172.

not clearly barred; and the 4 & 5 Vic. c. 35, passed for the commutation of certain manorial rights, and for the enfranchisement of copyhold lands, provides, that nothing in that Act shall operate so as to authorize or empower any lord of any manor to enclose any commons or waste lands (*o*); and the subsequent Act of 6 & 7 Vic. c. 23, further provides, that enfranchisement may be made, subject to any right of waste in lands belonging to the manor (*p*).

By 8 & 9 Vic. c. 118, being an Act for facilitating the enclosure exchange and division of commons, it is provided by section 27, that the Enclosure Commissioners are to embody in a provisional order the terms and conditions on which they are of opinion that an enclosure may be made, and of the proposed quantity and situation of the allotments; and in case the lord of the manor shall be entitled to the soil of the land proposed to be enclosed, the commissioners are to specify the share, or his portion of the residue of the land proposed to be allotted to the lord of the manor, in respect of his rights or interests in the soil, and whether such allotment is exclusive or inclusive of his right or interest in all or any of the mines, minerals, stone, and other substrata under such lands, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants, or any other right or interest of such lord in the land to be enclosed, as the case may appear to the commissioners to require, or as the parties interested, with the approbation of the commissioners, may have agreed, and in case there shall be any mineral property, or any rights in relation thereto, not vested in the lord of the manor, or other rights which shall appear to the commissioners proper to be specially provided for upon such enclosure, or to be excepted from the operation thereof, they are to specify the provisions or exception which should be made in that behalf; and after obtaining such consent as is provided for by the act, the enclosure may be made.

Where proceedings were taken under this Act, at the instigation of persons who claimed rights of common over

(*o*) Sec. 82.

(*p*) Sec. 1.

Mines and  
minerals  
expressly  
provided  
for.



the land proposed to be enclosed, the owner of the land being entitled to take brick earth, without interfering with the rights of common, it was held that the interest of such owner in respect of the brick earth ought to be taken into consideration in calculating the interests of the assenting and dissenting parties under the before-mentioned 27th section, notwithstanding all minerals and other substrata had been expressly reserved to such owner by the provisional order; and a prohibition was granted against the commissioner proceeding with the enclosure without the consent of such owner, or taking the value of the brick earth into account in reckoning the assents and dissents (g).

By section 97 of the said Act, 8 & 9 Vic. c. 118, it is enacted: "That in every case in which, under the provisions herein-after contained, part of the land subject to be enclosed under this Act shall be converted into and used as a regulated pasture, and the residue thereof shall be divided and allotted in severalty, it shall be lawful for the valuer, having regard to the right of the lord of the manor, as the same shall have been ascertained and declared by the provisional order of the commissioners, and with the consent of the lord of the manor and a majority in value of the other persons interested in the lands proposed to be enclosed, to direct that the rights of the lord of the manor in and to all or any of the mines, minerals, stone, and other substrata, under such part of the land as shall be converted into and used as a regulated pasture, shall be reserved to the lord, and that all or any of the mines, minerals, stone, and other substrata, under the residue to be divided and allotted in severalty, shall become the property of the owners of the respective allotments, and that the allotments be adjusted accordingly."

Reserva-  
tion of  
rights of  
the lord.

And by section 98 it is provided: "That in every case in which the right to all or any of the mines, minerals, stone, and other substrata, under any land enclosed under this act, shall exist as property distinct and separate from the property in the surface, and shall not be compensated

When pro-  
perty in  
minerals  
distinct  
from the  
surface.

(g) *Church v. The Enclosure Commis.* 31 L.J. C.P. 201. See also *Paine v. Ryder*, 24 Beav. 151.

upon the enclosure, the right and property in such mines, minerals, stone, or other substrata, and all rights and easements, auxiliary to, or connected with the exercise or enjoyment of the right and property in such mines, minerals, stone, or other substrata, shall be in nowise affected by the enclosure; and in case any mines, minerals, stone, or other substrata under any land enclosed under this Act, or the right of searching for or getting the same, shall have been leased, or agreed to be leased, to any person as property distinct and separate from the property in the surface, with or without powers over the surface of the land auxiliary to the purposes of such lease, the rights of the lessee or tenant under such lease or agreement shall be in nowise affected by the enclosure."

22 & 23  
Vic. c. 43.  
Rights re-  
served to  
be specified  
in pro-  
visional  
order.

And by the 22 & 23 Vic. c. 43, it is enacted that: "On any enclosure where the mines, minerals, stone, or other substrata under the land to be enclosed shall be excepted or reserved to the lord of the manor or any other person, the provisional order to be made by the Enclosure Commissioners for England and Wales shall (in addition to the other matters to be specified therein under the said Acts) specify whether or not a right to enter the lands when enclosed for the purpose of opening, working, or winning such mines, minerals, stone, and other substrata, is to be reserved to such lord or other person, and whether or not any compensation is to be made by the persons exercising such last-mentioned right for any damage to the surface which may thereby be done, and if not, then whether or not any such other provision for compensation of such damage as herein-after mentioned is to be made" (*r*).

Provision  
as to sur-  
face  
damage.

"For the purpose of providing for compensation for any such damage as aforesaid, it shall be lawful for the lord of the manor or other the person entitled to such mines, minerals, stone, or other substrata as aforesaid, and for the other persons interested in the land proposed to be enclosed, or such proportion of the persons so interested as by the 27th section of the Act of the 8th and 9th years of Victoria, c. 118, are required to consent to an enclosure

before the Enclosure Commissioners can in any annual general report certify their opinion that the proposed enclosure would be expedient, to agree as to the mode in which compensation for surface damage from such entry and opening, working or winning, shall be made to the individual owners whose allotments may be so damaged, whether wholly by the lord or such other person entitled to the mines, minerals, stone, or other substrata as aforesaid, or wholly by the owners of allotments (including the lord or such other person) collectively, or partly by the lord or such other person, and partly by the other owners of allotments collectively; and such agreement, when made, shall, if allowed by the Enclosure Commissioners, be stated to the valuer as part of his instructions, and its terms shall be embodied by him in his report and in his award of which it shall form part" (s).

"In every case in which the right and interest in all or any mines, minerals, stone, and other substrata are reserved by any provisional order to be issued after the passing of this Act to the lord of the manor or such other person entitled to the soil of the land enclosed as aforesaid, and with a further reservation to the lord or to such other person of a right to enter the lands when enclosed and work such mines, minerals, stone, and other substrata, it shall be lawful for the lord, his heirs and assigns, or for such other person entitled to the soil as aforesaid, his heirs and assigns, at any and at all time and times thereafter, by himself or themselves, or his or their tenants, agents, or servants, and with or without horses or other animals, or carriages, and materials of all kinds, to enter upon the said lands or any part thereof, and to break the surface thereof, and search for, win, work, take, and carry away the said mines, minerals, stone, and other substrata, or any of them, and for that purpose to dig, sink, drive, and make pits, shafts, drifts, headways, levels, adits, airgates, watercourses, soughs, trenches, buddles, fences, and sluices, and to erect, build, and make pumps, engines, furnaces, smelting-houses, stamping mills, ore and store houses, sheds, hovels, and

Powers to  
work  
mines, &c.

(s) Sec. 2.



stables, and other erections, and to do all other things necessary or convenient, as well for working the said mines as for refining the metals and minerals, hewing and working the stone and other substrata, and removing all the water, slag, and rubbish from the works, and for the accommodation of the persons employed therein, and to occupy such part of the said land as shall be convenient and sufficient for laying, ordering, and dressing the ores, minerals, metals, stone, and other substrata, and, if judged necessary, to alter the course of streams, and to maintain, repair, and use any railroads or other roads for any of the purposes aforesaid, and generally to do all other things necessary or convenient for the sinking, winning, working, and carrying away the said mines, minerals, stone, and other substrata, and for refining the metals and minerals, and hewing and working the stone and other substrata thereby produced" (t).

How  
damages to  
be assessed.

"In case it shall be provided that the whole or any part of such compensation as aforesaid shall be made by the owners of allotments collectively, either including or not including the lord or such other person as aforesaid, then all such damage as may at any time and from time to time be done to any allotment by any of the means aforesaid shall be assessed and raised as follows (that is to say): It shall be lawful for any person who may sustain any such damage as aforesaid to give information thereof to any two or more justices of the peace for the county or riding or other division or place within which the lands which shall have been enclosed, or the greater part thereof, shall be situate (ten days' previous notice of such intended information having been fixed on the church door of the parish or other ecclesiastical district); and such justices shall and are hereby empowered to examine and inquire into such complaint in a summary way, and by examination of witnesses upon oath, or by such other evidence as they shall think proper; and such justices shall determine the amount of such damage, and order the payment thereof to the party damaged by the persons and in the manner hereinafter expressed" (u).

(t) Sec. 3.

(u) Sec. 4.

“Every sum of money to be paid in satisfaction of such damages, and the reasonable charges of giving and prosecuting such information (to be settled by the said justices), shall be borne and paid by the owners for the time being of all the allotments on whom it shall by the award have been imposed, or their tenants, including the owner of the allotment damaged, or his tenant, by a rate to be assessed upon them in respect of their allotments or their shares therein by such justices according to the respective yearly values thereof, which shall be ascertained in manner hereinafter in that behalf directed or referred to” (*v*).

Payment of  
damages.

The rate may be levied by distress, and further provision is made respecting the award of the valuer and other matters consequent upon the enclosure (*w*).

By the 25 & 26 Vic. cc. 47 & 94, certain lands were authorized to be enclosed in pursuance of special reports of the Enclosure Commissioners.

Where lands were ordered to be enclosed by an Act of Parliament, the minerals and stones underneath being the property of the lord, it was held that the rights of the lord were reserved by implication, although no express reservation of them was made in the act (*x*); and where an Act directed allotments for public and specific purposes, one-fifth to be allotted to the lord of the manor for his interest in the soil, and the remainder of the common to be divided amongst the commoners to be held in severalty, and it was declared that the lord's seignorial rights were not to be prejudiced, except the right to the soil, and that he might thereafter enjoy all rents, heriots, “and all mines, minerals, quarries, and other royalties,” as if the Act had not been passed, it was held that the lord retained his rights to the mines and minerals under the land allotted to the commoners in severalty (*y*).

Rights of Common are not to be affected by a declaration of title obtained under the 25 & 26 Vic. c. 67, s. 29.

(*v*) Sec. 5.

(*w*) Secs. 6-15.

(*x*) *Micklethwait v. Winter*, 6 Exch. Rep. 644.

(*y*) *Pretty v. Solly*, 26 Beav. 606.

## CHAPTER X.

OWNERSHIPS IN MINES, MINERALS, AND QUARRIES, IN  
UNDER AND ADJACENT TO

RAILWAYS

HIGHWAYS

CANALS

WATERWORKS.

## RAILWAYS.

*Railway Clauses Act, 1845. Minerals do not pass on a Conveyance of the Land—Owners may work Mines after notice—Liberty to cut Airways, Headways, Gateways, Water-levels. Company to make Compensation for Losses to Owners—may enter and inspect Mines—Railway to be protected. Lands Clauses Act incorporated with Railway Clauses Act—Decisions as to working Mines—Compensation—Surface and Lateral support. Compensation for future loss. Arbitration. Scotland. Ireland. Rent-charges. Inquisition under Lands Clauses Act. Compensation for Severance of Lands. When an action lies, and not an assessment of damages under the Acts—Works for accommodation of Owners—Decisions in reference to Mines.*

Railway  
Clauses  
Act.

Minerals  
do not  
pass to  
company.

ALTHOUGH mines and minerals generally pass under a conveyance of the land, there is an exception in respect of lands purchased for a railway to be constructed by Act of Parliament. By the Railway Clauses Consolidation Act, 1845, 8 & 9 Vic. c. 20, section 77, it is enacted that: "A railway company shall not be entitled to any mines of coal, ironstone, slate, or other minerals, under any land purchased by them, except only such parts thereof as shall be necessary, to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance



of such lands, unless they shall have been expressly named therein and conveyed thereby" (a).

"If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do, thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company, and such owner, lessee, or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation" (b).

Owner may  
work  
mines after  
notice.

"If, before the expiration of such thirty days, the company do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines, or any part thereof, for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate, and if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the same shall be forthwith repaired or removed, as the case may require, and such damage made good, by the owner, lessee, or occupier of such mines or minerals, and at his own expense; and if such repair or removal be not forthwith done, or, if the company shall so think fit, without waiting for the same to be done, by such owner, lessee, or occupier, it shall be lawful for the company to execute the same, and recover from

(a) Sec. 77.

(b) Sec. 78; post, pp. 200, 203, 205.

such owner, lessee, or occupier, the expense occasioned thereby, by action in any of the superior courts" (c).

Liberty  
to cut  
airways,  
water-  
levels,  
&c. &c.

"If the working of any such mines under the railway or works, or within the above-mentioned distance therefrom, be prevented as aforesaid by reason of apprehended injury to the railway, it shall be lawful for the respective owners, lessees, and occupiers of such mines, and whose mines shall extend so as to lie on both sides of the railway, to cut and make such and so many airways, headways, gateways, or water-levels through the mines, measures, or strata, the working whereof shall be so prevented, as may be requisite to enable them to ventilate, drain, and work their said mines, but no such airway, headway, gateway, or water-level shall be of greater dimensions or section than the prescribed dimensions and sections, and where no dimensions shall be prescribed, not greater than eight feet wide and eight feet high; nor shall the same be cut or made upon any part of the railway or works, or so as to injure the same, or to impede the passage thereon" (d).

Company  
to make  
compensa-  
tion.

"The company shall from time to time pay to the owner, lessee, or occupier of any such mines extending so as to lie on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner, lessee, or occupier, by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being interrupted as aforesaid, or by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the company which cannot be obtained by reason of making and maintaining the railway; and if any dispute or question shall arise between the company, and such owner, lessee, or occupier as aforesaid, touching the amount of such losses or expenses, the same shall be settled by arbitration" (e).

"If any loss or damage be sustained by the owner or occupier of the lands lying over any such mines the working whereof shall have been so prevented as aforesaid (and not being the owner, lessee, or occupier of such mines), by

(c) Sec. 79.

(d) Sec. 80.

(e) Sec. 81.

reason of the making of any such airway or other work as aforesaid, which or any like work would not have been necessary to be made but for the working of such mines having been so prevented as aforesaid, the company shall make full compensation to such owner or occupier of the surface lands for the loss or damage so sustained by him" (*f*).

For better ascertaining whether any such mines are being worked, or have been worked, so as to damage the railway or works, it shall be lawful for the company, after giving twenty-four hours' notice in writing, to enter upon any lands through or near which the railway passes wherein any such mines are being worked, or are supposed so to be, and to enter into and return from any such mines or the works connected therewith; and for that purpose it shall be lawful for them to make use of any apparatus or machinery belonging to the owner, lessee, or occupier of such mines, and to use all necessary means for discovering the distance from the railway to the parts of such mines which are being worked or about so to be (*g*). If any such owner, lessee, or occupier of any such work shall refuse to allow any person appointed by the company for that purpose to enter into and inspect any such mines or works in manner aforesaid, every person so offending shall for every such refusal forfeit to the company a sum not exceeding £20 (*h*).

Company  
may enter  
and inspect  
mines.

If it appear that any such mines have been worked contrary to the provisions of this or the especial Act, the company may, if they think fit, give notice to the owner, lessee, or occupier thereof to construct such works, and adopt such means as may be necessary or proper for making safe the railway and preventing injury thereto; and if after such notice any such owner, lessee, or occupier do not forthwith proceed to construct the works necessary for making safe the railway, the company may themselves construct such works, and recover the expense thereof from such owner, lessee, or occupier, by action in any of the superior courts (*i*).

Railway  
to be  
protected.

(*f*) Sec. 82.

(*g*) Sec. 83.

(*h*) Sec. 84.

(*i*) Sec. 85.



Lands  
Clauses  
Act.

Owner  
may work  
mines.

Compen-  
sation.

The Railway Clauses Consolidation Act, 1845, is limited in its operation to any railway which should after the passing of the said Act be authorized by Parliament to be constructed, and the said Act was declared (*j*) to be incorporated with the Lands Clauses Consolidation Act, 1845 (*k*), and all the clauses and provisions of the Railway Clauses Consolidation Act, save so far as they shall be expressly varied or excepted by the Lands Clauses Consolidation Act, are to apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and are, as well as the clauses and provisions of every other Act, which shall be incorporated with such Act, to form part of such Act, and be construed together therewith as forming one Act. Under and by virtue of these two Acts, it has been decided that a railway company cannot prevent the owner of the minerals from working the minerals, unless he purchase them and pay the compensation directed by the before-mentioned Act. On this question, Martin, B., is reported to have said: "The land was not purchased by the company under a common law conveyance, but under the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Act; and they never bought the mines at all; they only bought the surface. Reading both Acts together this is clear, that the mines are to be taken as excepted. The company in each case have the option of taking the mines, that is, of buying them, for the purpose of protecting the railway from any chance of injury; and in case they desire to purchase the mines, there is a proceeding provided for assessing compensation, which was actually resorted to on this occasion." The above decision was affirmed in the Exchequer chamber, and the question was there raised, whether compensation could be claimed for all the minerals underneath, or only for such as could have been worked without damage to the surface. On this point, Cockburn, C.J., said: "No doubt at common law, when a landowner parts with the surface and reserves to himself the minerals, he subjects himself to the obligation of not so dealing with the strata below as to deprive the

(*j*) 8 & 9 Vic. c. 20, ss. 1, 6.

(*k*) 8 & 9 Vic. c. 18.

surface of support; and it is unnecessary for us to determine what would have been the decision had there been such a separation, prior to the taking of the surface, by the railway company. It may be that, in such a case, the Act would have no operation at all, or that the owner of the minerals would not be entitled to any compensation, in respect of any loss which he might sustain, from not being allowed to work the strata below the railway, so far as they were necessary for the support of the surface" (*l*). Support to surface.

In a previous case, which was decided prior to the Railway Clauses Act (*m*), it was held that there was a right by implication to all reasonable subjacent and adjacent support; and although there is an obvious distinction between a purchase made before and after the Act, and effected under the Act, the same doctrine, so far as the question of right of support is concerned, would probably be upheld in a compulsory as well as a voluntary purchase (*n*). The question came before the court in November, 1861, when the Lord Chancellor is reported to have said (*o*): "The great struggle which the appellant has made has been against the right of lateral support claimed for the bridge, and the land on which it stands to be afforded by the adjacent land of the defendant. He freely admits the general law upon this subject as settled by *Humphries v. Brogden* (*p*) and subsequent cases, and acknowledges that the plaintiffs would have been entitled to the lateral support which they claim if *Boulcott* had voluntarily sold and conveyed the land on which the bridge is erected. He denies this right to lateral support, because *Boulcott* sold and conveyed the land under the compulsory powers of an Act of Parliament. But can it be supposed that the Legislature intended that when the owner of the land had so sold and conveyed it for a particular purpose, he could, in derogation of his grant, deprive it of lateral support, with-

(*l*) *Fletcher v. Gt. Western R. Co.* Support;" *Rex v. Leeds and Selby* 28 L.J. Ex. 147; 29 L.J. Ex. Ry. Co. 3 Ad. & Ell. 683.  
253.

(*o*) *North Eastern Rail. Co. v. Elliott*, 30 L.J. Ch. 164.

(*m*) *Caledonian Ry. Co. v. Sprot*, 2 Macqueen, 449. (*p*) 12 Q.B. 739; s.c. 20 L.J.

(*n*) *Post*, chapter on "Right of Q.B. 10.

Lateral  
support.

out which it must be wholly unfit for the purpose for which it was sold and conveyed? The conveyance which refers to the Act of Parliament, coupled with the plan shown upon it, denoting the part of the land on which the abutment of the bridge was to be constructed, clearly indicated the purpose to which the land was to be applied; and can it be supposed that the vendor, when the bridge was erected, should be at liberty to withdraw from it the lateral support, without which it could not stand? He suffers no hardship from the restraint; for when the value of the land on which the bridge was to be erected was estimated, the possible deterioration of the adjoining land, by reason of the support required from it, would necessarily be taken into consideration. It is objected that this bridge across the Wear is a wonderful work of engineering art, requiring extraordinary support, and that there was upon the conveyance no specification of its elevation or its materials. But although the bridge be of one arch of extraordinary span, there is no reason to believe that it was not skilfully and prudently planned and executed; and in the court below the defendant took no such point against the injunction. The power of the Legislature to deal with such matters cannot be disputed; and when the Legislature required such a conveyance to be executed, must not the conveyance, when executed, have all the usual incidents of such a conveyance? and must not the estate thereby vested in the purchasers have all the usual rights, privileges, and protection to which such an estate is entitled? However, it is unnecessary further to reason upon the subject, for the law which the plaintiffs contend for was solemnly laid down and acted upon by the House of Lords, in the recent case of the Caledonian Railway Company *v.* Sprot (*q*). Reliance is placed by the appellant on the subsequent case of Fletcher *v.* the Great Western Railway Company (*r*). But an inferior court could not overrule the decision of the House of Lords; and (as might be expected) the two cases, when compared together, are in their facts and circum-

(*q*) 2 Macqueen, 449; see post, (r) Ante, p. 201.  
"Lateral and Surface Support."



stances materially different." In the case of the London and North Western Railway Company *v.* Ackroyd (*s*), the company purchased the right of making, and for ever maintaining and using, a tunnel through the lands of the defendant; the company sought to establish a right to support, from the minerals lying within forty yards of the tunnel, without making such compensation as is provided by the 78th section of the Railway Clauses Consolidation Act, but the court held that the company were not entitled to such support; the rule that a grantor cannot derogate from his own grant not applying, and that the case was within the authority of *Fletcher v. Great Western Railway Company*.

In another case before the Lands Clauses and Railway Clauses Consolidation Acts, 1845, where a railway company was empowered by statute to take lands for a railway, making compensation to any person interested for any damage or inconvenience sustained by the execution of any of the works authorized by the Act, it was held that when compensation had once been awarded, although the coal mines underneath had not been taken into account, no compensation for subsequent loss by the owner of the coal mine could be claimed, because the Act did not contemplate compensation for a future inconvenience; but now, by the 124th section of the said Lands Clauses Act, 1845, all interests omitted to be purchased may be subsequently purchased, and compensation claimed in respect thereof (*t*). And the said Railway Clauses Act, 1845, makes provision for the settlement of disputes by arbitration when any such dispute is authorized or directed by that Act, or the special Act (*u*), or any Act incorporated therewith, to be determined by arbitration (*v*); and by the said Lands Clauses Act, which is incorporated with the said Railway Act, provision is also made for settling disputes respecting the value of any land, or any interest

Compensation for future loss.

Arbitration.

(*s*) 31 L.J. Ch. 588.

(*t*) *Doe d. Hyde v. Mayor of Manchester*, 12 C. B. 474; *Sparrow v. Oxford, W. & W. Rail. Co.* 2 De Gex, M. & G. 94; *S. C.* 9 Hare, 436; re

*Duke of Beaufort and Swansea Harbour Trustees*, 29 L.J. C.P. 241.

(*u*) For meaning of "Special Act," see 8 & 9 Vic. c. 20, s. 2.

(*v*) 8 & 9 Vic. c. 20, ss. 126-139.

therein which may be required to be taken under the said Act, or as to the compensation to be made in respect thereof; and where the claim does not exceed £50, two justices of the peace may adjudicate on the claim; but if exceeding that sum, the dispute must be settled by arbitration or a jury, at the option of the party claiming compensation (*w*).

**Scotland.** The above-mentioned Acts do not apply to Scotland, but similar provisions for that country are contained in two subsequent statutes, 8 Vic. cc. 19, 33 (*x*); and for Ireland by 14 & 15 Vic. c. 70.

**Ireland.**

**Rent-charges.** By 23 & 24 Vic. c. 106, which applies to the United Kingdom of Great Britain and Ireland, provision is made for enabling all persons (except persons seized in fee, or entitled to dispose of their interests absolutely), whether under any disability or not, to sell and convey lands, and interest in land, in consideration of an annual rent-charge, feu-duty, or ground-rent, in lieu of a gross sum, and the said Act points out the mode of proceeding in such cases.

**Inquisition under Lands Clauses Act.** On an inquisition under the 68th section of the Lands Clauses Act, the only question which can be inquired into is the amount of compensation for the damage done, and there is no jurisdiction to inquire into the legal rights of the claimant (*y*); but in an action on a judgment upon an inquisition, the defendant may, notwithstanding the finding of the jury, set up a defence that the plaintiff had not been in any way injured or damaged in his property (*z*).

**Compensation for severance of lands.** Section 63 of the Lands Clauses Act is as follows: "In estimating the purchase-money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the

(*w*) 8 & 9 Vic. c. 18, ss. 21-25, 68; *Burkenshaw v. Birmingham and Ox. J. Ry. Co.* 5 Ex. 475; *Reg v. London & N. W. Ry. Co.* 3 Ellis & B. 443; *Bradshaw's Arbitration*, 12 Q.B. 562; *re Duke of Beaufort*, 29 L.J. C.P. 241; *Yates v. Mayor of Blackburn*, 29 L.J. Ex. 447; *Sir E. Baker v. Metropo-*

*litan Ry.* 32 L.J. Ch. 7; *Croft v. London & N. W. Ry.* 32 L.J. Q.B. 113.

(*x*) *Scottish N. E. R. Co. v. Stewart*, 5 Jur. N.S. 607.

(*y*) *Reg v. the Metropolitan Ry. Co.* 32 L.J. Q.B. 367.

(*z*) *Read v. Victoria & P. Ry. Co.* 32 L.J. Ex. 167.

undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this, or the Special Act, or any Act incorporated therewith." In an arbitration which occurred under this section, the arbitrator did not award anything by reason of the severance, but only for the value of the land itself; it was nevertheless held that the award was good, and that the arbitrator, by his silence, negatived any right to compensation in respect of severance damage (*a*).

Where mines are flooded by reason of water flowing along a railway cutting, and percolating through the bed of the railway into the mines beneath, it was held that the railway company were liable to an action for damages occasioned by such flooding, and that such damage was not the subject of compensation under the Railway and Lands Clauses Acts, 1845. The material facts of the case which gave rise to these several points were the following (*b*): The plaintiffs were owners and occupiers of a coal mine; the surface soil, as well as the coal below, formerly belonging to the same owner, but a railway company (to whose rights and obligations the defendants had succeeded) took the surface, under the powers of a special Act of Parliament, for their railway, and constructed it thereon; the railway company (by which may be understood indifferently the original company or the defendants) cut and removed upwards of twenty feet in thickness of the surface over the plaintiffs' mine to get the level at which they laid their rails; this surface soil was clay, impervious to water, by removing it a porous rock was reached; the soil was, in like manner, cut away by the railway company along the length of the line to a district of country through which a brook flowed; here the railway was on or above the natural level of the ground; it was carried over the brook by a flat bridge; the line of railway sloped downwards from the

When an action lies, and not.

Assessment of damages under the Acts.

(*a*) *Re Duke of Beaufort*, 29 L.J. 31 L.J. Ex. 129, 480; s.c. 7 H. & C.P. 241. N. 423; see also *R. v. London & N.*

(*b*) *Bagnall v. L. & N. W. Ry. Co.* W. Ry. Co. 2 Rail. C. 729.



bridge to a part over the plaintiffs' mine; the bridge was sufficient to let the ordinary water of the brook pass, and even more, but was found an impediment in the case of large floods; the railway company were bound to make and maintain drains, the obligation being the same as in the Lands Clauses Consolidation Act. A flood happened in 1860, and the result of the combined acts of the company was that water, part of which would have escaped but for the bridge, flowed down the railway, and the high ground between the brook and the surface over the mine being removed it reached that spot, and the high ground and protection of clay then being gone, and the drains being imperfect as after mentioned, it permeated into the mine; so also did the water falling on the spot itself, and the springs arising in the cutting. But it here becomes necessary to mention, that when the railway was being made the mines were not worked under nor within forty yards of the railway; the railway was made with drains at the side, sufficient to carry off the water which fell or came there without doing any mischief as matters then stood; when the plaintiffs' workings came to forty yards from the railway, they gave the defendants notice under the local Act, which may be treated as substantially the same in its provisions as the Railway Clauses Act. The defendants, however, did not purchase the mines. The plaintiffs, accordingly, worked on, and when their workings came under the railway, from no fault or negligence of theirs, but as a natural consequence of fair and lawful working, the railway sank, and continued to do so from time to time. The defendants repaired this by throwing material of a porous character on the sunken parts; they did not, however, repair and puddle the drains, which, from the sinking of the soil, became inefficient, and even had they been efficient they would not have carried off the flood-water. For the damage sustained from the water thus getting into the mines this action was brought. In delivering judgment the learned judge said: "It seems to us impossible to state these facts without showing that the plaintiffs have a claim on the defendants of some kind. Without any fault of

theirs the natural condition of things had been altered. The water of the brook, which flowed at a distance of one-third of a mile from their mine, inaccessible to it by being separated from it by ground twenty-five feet high, has been diverted over it; its natural covering and upper soil having been removed from it. From the last-mentioned circumstance and the want of efficient drains, the rain which fell upon it and the springs which rise in the cuttings have got into it. These are the acts of the railway company alone. It is said the plaintiffs have brought about the mischief by working their mines; but they have a right to work them as they did. They lose no right by doing so. It could not be contended that had the defendants thought fit to agree to purchase they could have done so at a nominal price, on the plea that if the plaintiffs worked them they would be worthless, as they would be drowned. We do not say that the defendants were bound to restore the surface; they might have diverted their line and left hollows over the spot in question, but they were bound by their Act to make and maintain effectual drains. This reasoning applies to water other than at the time of flood. As to that, the plaintiffs' case is still clearer. Suppose, instead of the defendants' railway passing through a cutting and over a brook it had been a branch railway belonging to a private proprietor and joining the defendants' railway just before reaching the plaintiffs' mine, would not such a private proprietor have been clearly liable to this action? and if so, why are not the defendants? As to the flood-water, they are not sued merely as a railway company who have taken the surface of the plaintiffs' land, but as persons who, by their acts on land at a distance, have done this injury; and it seems to us they would be liable for the damage by flood-water if the plaintiffs had continued owners of the surface, and for some reason had thought fit to remove it to the depth the railway company has here, for it would still be the acts of the defendants that sent the water there. But it was suggested that if the plaintiffs had a claim it was to be enforced under the compensation clauses. We think not.

The plaintiffs are not injuriously affected by the works of the railway company. Supposing the company had possessed no statutory powers, they could not have been restrained by injunction from executing any of these works, nor could any action have been maintained against them simply for their construction. The railway company would have been entitled to say, these are not injuries, and never will be. By means of puddling the surface and drainage, no water will ever reach you, nor need it, as appears. It is not, therefore, the works intrinsically which injuriously affect the plaintiffs, but the defendants' wrong conduct in relation to them in not making and maintaining outlets for the flood-water, or damming it off the plaintiffs' land, or covering the surface thereof with clay, and in not maintaining those drains which were efficient to carry off the rain which fell and the spring-water which arose there. Our judgment, therefore, is for the plaintiffs in respect of both these claims" (c).

Works for  
accommodation of  
owners.

The 68th section of the Railway Clauses Act enacts that railway companies shall make and maintain certain works for the accommodation of the owners and occupiers of lands adjoining the railway; and *inter alia*, "all necessary arches, tunnels, culverts, drains, \* \* \* either over or under, or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be." The section does not contain the word "mines," but by section 3 of the Act the word "land" is to include "hereditaments of any tenure." The 69th section provides for the determination by justices of disputes respecting accommodation works. A railway company made drains upon their line; at that time no mines had been worked beneath the railway, but the owners of the mines afterwards opened and worked mines; but, in consequence of the drains which had been made by the railway company, the water percolated through the strata into the mines, and interfered with the proper working of the mines;



but it was held, 1st, that the jurisdiction of the justices does not apply to such a case; 2ndly, that the question whether works made by the company are works made for the accommodation of the owner must be determined by the state of things existing at the time such works are done; 3rdly, that the above sections do not apply to matters occurring beneath the surface of the land (*d*).

### HIGHWAYS.

*Minerals belong to owners of adjoining soil, usque ad medium filum viæ.* 7 & 8 Geo. IV. c. 24—5 & 6 Will. IV. c. 50. Surveyors may take stone, gravel, &c.—their liability for injuries to Mines. Mining works within certain distances of roads, prohibited. 4 & 5 Vic. c. 81—8 & 9 Vic. c. 71. Surveyors not to exercise their powers recklessly. Prescriptive right. Fences.

WHEN a road is constructed through the lands of a private person and dedicated to the public, the highway alone becomes the property of the public; but the soil and minerals, *usque ad medium filum viæ*, belong to the owners respectively of the adjoining lands (*e*); the same principle applies equally to a private as to a public road (*f*); and if a road is made under and by virtue of an Act of Parliament, and vested in trustees, for the use of the public, nothing but the road, in the absence of a special enactment, passes to the trustees; so that the owner of the minerals may maintain an action of trespass for any interference with his rights, either by strangers or the trustees of the road (*g*).

By 7 & 8 Geo. IV. c. 24, s. 18, entitled "An Act to Amend the Acts for regulating Turnpike Roads in England," it is provided; "That all mines of iron, tin, lead, copper, coal, and other minerals whatsoever, which shall be discovered or found in or under any land to be used for

(*d*) Reg. v. Fisher, 32 L.J. M.C. 12.

(*e*) 2 Inst. 705; Goodtitle v. Alker, 1 Burr. 143, 1 Roll. Abr. 392; Dovastan v. Payne, 2 H. B. 527; Reg. v. Pratt, 24 L.J. M.C. 113.

(*f*) Holmes v. Bellingham, 7 C.B. N.S. 329.

(*g*) Davison v. Gill, 1 East, 69; Rex v. Mersey Navigation, 9 B. & C. 95; Rex v. Thomas, 9 B. & C. 114; Harrison v. Parker, 6 East, 154.

any turnpike road, shall be, and they are hereby reserved to the person, body politic, corporate or collegiate, who would have been seized of, or entitled to the same, in case the act for making such road had not been passed; with liberty for him, or his agents or servants, to dig for, mine, and work the same, in such manner as is usual for carrying on work of that kind in the county, district, or place where such mines shall be found, in as full and ample a manner as if the said land had not been taken and appropriated for the purposes aforesaid, so that in the working thereof no damage shall be done to such road, or any part thereof" (*h*).

5 & 6 Will.  
IV. c. 50.

By 5 & 6 Will. IV. c. 50, s. 82 (*i*), entitled "An Act to Consolidate and Amend the Laws relating to Highways in England," all mines, minerals, and fossils, lying under any lands to be taken for widening highways, are reserved to the owners of the soil, but without power to interfere

Surveyors  
of highway  
may take  
gravel, &c.

with the surface; nevertheless, the surveyor of highways is enabled to search for and carry away any gravel, sand, stone, or other materials of and from any waste lands, or common ground, river or brook, but so as not to divert or interrupt the course of any river or brook, and provided nothing is dug out of any river or brook within one hundred and fifty feet above or below any bridge, dam, or wear (*j*). The surveyor may also gather stones lying upon any lands or grounds, in the parish where such highway shall be, for such service and purpose, and take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways, without making any satisfaction for the said materials; but satisfaction shall be made for all damages done to the lands or grounds of any person or persons, by carrying away the same in the manner directed in the Act for getting and carrying materials in enclosed lands or grounds; but no such stones shall be gathered without the consent of the owner of such lands or grounds,

(*h*) As to the legal meaning of the words "Turnpike Roads," see *Norham Bridge v. London & S. Ry.* 6 M. & W. 428.

(*i*) See 25 & 26 Vic. c. 61.

(*j*) See 3 Geo. IV. c. 116, ss. 97-101, which contain similar provisions.

or a license for that purpose obtained from two justices of the peace at a special sessions for the highways (*k*).

Nothing in the Act relative to the gathering or getting of stones, or other materials, is to extend to any quantity of stones or other materials thrown up by the sea, commonly called beach, where the removal of the same would cause any damage or injury by inundation to the lands adjoining, or increased danger of encroachment by the sea (*l*); and before any materials are taken, notice thereof must be given to the owner or his agent, and when the holes or pits have been made in the land by the surveyor, he must slope them down or fence them off, as the case may be (*m*). The surveyor who damages any mine whilst carrying out the provisions of the Act, is liable on conviction before a justice to a penalty not exceeding £5, in addition to any civil liability he may incur (*n*). On the other hand, the proprietors of a mine are prohibited from sinking any shaft or erecting any engine within twenty-five yards, or any windmill within fifty yards of a public road (unless sufficiently screened), which would be likely to endanger passengers, horses, or other cattle (*o*).

Liability  
for danger  
to mines.

Mining  
works  
within cer-  
tain dis-  
tances of  
road, pro-  
hibited.

By a subsequent Act, 4 & 5 Vic. c. 51, it is provided that all lands and grounds which may be in the exclusive occupation of any person for agricultural purposes, are to be deemed and taken to be enclosed lands or grounds within the meaning of the before-mentioned Act of 5 & 6 Will. IV. c. 50, even although the said lands or grounds may not be separated from any adjoining lands, or from a highway by any fence or other enclosure. The before-mentioned Act of 5 & 6 Will. IV. c. 50, enabled the authorities of a parish to sell and convey lands from which the said materials had been exhausted, and to purchase other lands in lieu thereof; and by 8 & 9 Vic. c. 71 it is provided that the provisions of the before-mentioned Act shall apply and extend not only to the lands in the said Act specified, "but to all lands belonging or which thereafter may belong to parishes, or to the surveyor of the highways, for the purposes aforesaid, which

4 & 5 Vic.  
c. 51.

8 & 9 Vic.  
c. 71.

(*k*) Sec. 51. (*l*) Sec. 52. (*m*) Secs. 53, 55. (*n*) Sec. 57. (*o*) Sec. 70.



have been or thereafter shall be lawfully used for the purpose of obtaining materials for the repair of the highways in such parish, the materials in which lands have been or thereafter may be exhausted."

Surveyors  
not to  
exercise  
powers  
recklessly.

The powers given to the surveyors under the before-mentioned statutes are not to be wantonly or maliciously exercised, but only for the necessary purposes of the Act. In *Bayfield v. Porter*, 13 East, 209; Bayley, J., said, "Where there is a subsisting road by which the materials may be carried, the surveyors are not wantonly to deviate from that, and to make a new road for the purpose: but where there was not a convenient road before, the Act authorizing the getting and taking of the materials in enclosed lands where they cannot conveniently be gotten in the open lands of the parish, and the getting them from another parish where they cannot conveniently be had in the same parish where the highway to be repaired lies, authorizes the making of a new road in order to get them conveniently. It was competent however to the plaintiff to have shown by evidence that the new road was wantonly made."

Prescrip-  
tive right.

Surveyors cannot justify a trespass under a prescriptive right or even a custom, to take stones from the waste, whether adjoining the sea-shore between high and low water mark or otherwise, for the purpose of repairing the highways; but assuming such a prescription to be good, it ought to be pleaded as an immemorial custom for the inhabitants of the parish to take stone from the waste, for the purpose of repairing the highway, averring that the surveyors were two of the inhabitants, as was done in *Johnson v. Wyard* (*p*). Equity will not interfere till the right has been decided by a court of law (*q*).

Fences.

The ordinary presumption is, that strips of land lying along a highway, even though only indirectly connected with other parts of the waste, belong to the owners of the adjacent enclosed land; and if mines or quarries are dug

(*p*) 2 Lutw. 1344; see also Co. Litt. 118 b; *Oxenden v. Palmer*, 2 B. & Ad. 236; *Padwick v. Knight*, 7 Exch. 854.

(*q*) *Clowes v. Beck*, 20 L.J. Ch. 505.

therein, the owner of such lands, and not the surveyors of the highways, is bound to protect the public, by fencing in all shafts or pits opened in the waste lands (*r*).

Special provisions in reference to the opening of shafts or pits in highways in Cornwall were made by the Stannary Parliament, 2 James II. Stannary law.

### CANALS.

*Clauses in Canal Acts are similar to those in the Railway Clauses Act—Decisions respecting the one, generally applicable to the other—Right of owner to work Mines—Compensation.*

WHEN an Act of Parliament is obtained for constructing a canal, it is usual to insert clauses providing that the mines and minerals under the land purchased, for the purposes of the Act, shall continue and remain in the proprietor of the soil, unless expressly purchased by the proprietors of the canal. The right of the owner of the minerals to search and dig for the minerals, in case the owners of the canal have declined to purchase them, without any liability for injuries caused to the canal during the proper working of the mine; the amount of compensation which the owner of the minerals is to receive in case the mines are taken by the proprietors of the canal; and other provisions in reference to mines are generally inserted in the special Act. Such provisions are similar to those contained in the Railway Clauses and Lands Clauses Acts, and the questions which arise under the one will be generally applicable to the other (*s*); but much must necessarily depend upon the powers and provisions inserted in the special Act under which the canal is to be constructed. General provisions.

Where a canal company obtained an Act, in which were inserted special provisions, prohibiting the owners of a mine Right of owners to work mines.

(*r*) *Simpson v. Dendy*, 6 Jur. N.S. 484; *Dudley Canal Co. v. Grazebrook*, 1 Barn. & Ad. 59; *Mold v. Wheatecroft*, 29 L.J. Ch. 11; *Swindell v. Birmingham Canal Co.* 29 L.J. C.P. 364; *Stourbridge Canal Co. v. Earl of Dudley*, 30 L.J. Q.B. 108.

(*s*) *Ante*, p. 196; and *Wyrley & Essington Canal Navig. Co. v. Bradley*, 7 East, 368; *Barnsley Canal Co. v. Twibell*, 7 Beav. 19; *s.c.* 13 L.J. Ch.

from working within twelve yards of the canal, without their consent, with powers, however, for the owners of the mine, after notice to the canal company, to work the minerals, without doing injury to the navigation of the canal, unless the company, within a certain time, paid the owner for the value of his minerals; it was held that the owner of the mine having complied with the requirements of the Act (and the company having failed to prohibit the working of the mine or to purchase the minerals), was entitled to work the mine, under a reservoir belonging to the canal, and that the company had no right of action against the mine-holder for damages occasioned to such reservoir by the proper working of the mine (*t*).

Compensation.

In the case of *Reg. v. Aire and Calder Navigation Company (u)*, where it was known at the time of the conveyance that there were coals under the land conveyed, and the purchase-money was agreed upon and paid with that knowledge, the owners of the land, who had power to get the minerals without damaging the canal, failed to make out their claim for compensation. The authority of *Rex v. Leeds and Selby Railway Company* was upheld (*v*).

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#### WATERWORKS.

*Minerals do not pass on a conveyance of the land—may be purchased. Railway and Lands Clauses Acts—Compensation for damages in continuation of works. Arbitration.*

Minerals do not pass on a conveyance of the land.

By 10 & 11 Vic. c. 17, entitled "An Act for Consolidating in one Act certain Provisions usually contained in Acts authorizing the making of Waterworks for supplying Towns with Water," it is enacted, with respect to mines, that the undertakers of such works "shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as

(*t*) *Stourbridge Canal Co. v. Earl Dudley*, 30 L.J. Q.B. 108.

(*u*) 30 L.J. Q.B. 350.

(*v*) 3 Ad. & Ell. 683; 5 Nev. & M. 246.



shall be necessary to be dug, or carried away, or used in the construction of the waterworks, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby" (*w*). The Act contains a power enabling the undertakers of the said waterworks to purchase the mines or minerals lying under any of the ground taken by them, or within certain prescribed distances, upon paying compensation to the owners thereof; and in case of differences or disputes, the same are to be settled by arbitration, in manner directed by the before-mentioned Railway and Lands Clauses Acts (*x*), unless otherwise provided for by this or the special Act; but in case the said undertakers refuse to purchase, the owners of the mines may work them in a reasonable manner, after having given notice of their intention to the said undertakers (*y*).

Minerals  
may be  
purchased.

Section 27 of the said Act (10 & 11 Vic. c. 17) provides that "nothing in this or the 'special Act' shall prevent the undertakers from being liable to any action, or other legal proceeding, to which they would have been liable for any damage or injury done or occasioned to any mines by means or in consequence of the waterworks, in case the same had not been constructed or maintained by virtue of this Act or the special Act" (*z*); and by the 12th section of 10 and 11 Vic. c. 17 it is provided that the undertakers shall make full compensation to all parties interested for all damage sustained by them through the exercise of the powers of the Act. In the execution of certain works authorized by a local Act, incorporating that section, the undertakers of the works intercepted water which would otherwise have percolated through the strata of the earth into a well on the premises of another person, and water which had actually entered the well had been thereby drained off; a complaint was accordingly made to justices of the peace, who ordered compensation to be paid for the

Compensation  
for  
damages.

(*w*) Secs. 18-27.

(*y*) 10 & 11 Vic. c. 17, secs. 18-27.

(*x*) 10 & 11 Vic. c. 17, secs. 6, 85;  
ante, pp. 196, 200, 205.

(*z*) See sec. 2 of 10 & 11 Vic. c. 17,  
for meaning of "Special Act."

loss of the water ; but it was held, on appeal, by the Court of Queen's Bench that the order was wrong, for that inasmuch as no action would lie, supposing no Act authorizing the execution of the works had been passed, the claim for compensation could not be sustained. *Chasemore v. Richards* (*a*) was referred to by Chief Justice Cockburn as an authority for showing that water which percolates through the earth is not a thing for the intercepting of which an action will lie, and that therefore there was no cause of action in respect of the water which would have found its way into the well of another person ; and *Acton v. Blundell* (*b*) was quoted as an authority that an action will not lie for water which had not reached the well, therefore that there was no claim for compensation for the water which had actually been drained off the well, as in the present case (*c*).

(*a*) 29 L.J. Ex. 81 ; 7 H. L. Cases, 349.

(*c*) *New River Co. v. Johnson*, 29 L.J. M.C. 93.

(*b*) 12 M. & W. 324.

## CHAPTER XI.

## OWNERSHIPS IN MINES, MINERALS, AND QUARRIES.

## WHEN THE OWNERS ARE UNDER DISABILITIES.

INFANTS.

MARRIED WOMEN.

IDIOTS AND LUNATICS.

## IN THE EVENT OF BANKRUPTCY.

ASSIGNEES OF BANKRUPTS.

OFFICIAL LIQUIDATORS.

## IN MORTGAGED PROPERTY.

MORTGAGEES.

## WHEN THE OWNERS ARE UNDER DISABILITIES.

**INFANTS.** *Right of an Infant, or his Guardian, to search for Minerals in a fee-simple Estate, when the Infant is Tenant-in-tail. Contracts which bind the Infant. Jurisdiction of the Court of Chancery. Indefeasible Title.*

**MARRIED WOMEN.** *Liability of the Husband for waste committed in his Wife's Estates. Power of a married Woman to purchase a Mineral Estate—Power of alienation. Indefeasible title.*

**IDIOTS AND LUNATICS.** *When Contracts are binding. Jurisdiction of the Court of Chancery—the Court will authorize an expenditure in Mines, and Leases of opened and unopened Mines. Partnership with a Lunatic.*

If an infant becomes entitled to an estate in fee-simple, **INFANTS.** he or his guardian may search for minerals, as an ordinary tenant in fee-simple; and where the infant is tenant-in-tail in possession, the infant or his guardian may exercise the same right, and the Court of Chancery will not interfere with the guardian, unless he is doing something to prejudice the infant. This latter proposition was in



effect held in the cases of *Saville v. Saville* (*a*), and *Lyddal v. Clavering* (*b*). But an infant cannot generally make any conveyance of his rights to others on account of his incapacity to bind himself by his own acts; and a will of an infant containing either a devise of real estate or a bequest of personal property is absolutely void (*c*). As a rule, indeed, all contracts made by an infant, whether in relation to real or personal estate, if to his disadvantage, are invalid; if to his advantage, valid; whilst those which do not fall distinctly under the one predicament or the other, are voidable at election, but any contract made by an infant may be confirmed by the infant on his coming of age, or by his representatives after his death (*d*); but in equity, an infant is not so free from liability as he is at law, if he be guilty of fraud; as, for instance, where he induces other persons to contract with him, by fraudulently representing himself to be of age (*e*).

The estates of infants are now under the control of the Court of Chancery, and are governed by several recent Acts of Parliament, under and by virtue of which leases and other limited dispositions of their mineral estates may be made (*f*). The Act to facilitate the granting of leases and the sale of settled estates (*g*), as well as the Acts for obtaining an indefeasible title (*h*), apply to the estates of infants (*i*).

The husband of a lessee for life is solely answerable for waste committed in his wife's estate during the coverture, whether by himself or his wife (*j*). And where a "feme coverte," who was tenant-in-tail in possession, contracted

MARRIED  
WOMEN.

(*a*) 2 Eq. Ab. 704; 1 Ves. S. 548; 1 Salk. 161.

(*b*) Amb. 371.

(*c*) 7 Will. IV. & 1 Vic. c. 26.

(*d*) 2 Inst. 483; Co. Litt. 45<sup>b</sup>, 308<sup>a</sup>; Maddon d. *Baker v. White*, 2 T.R. 161; *Smith v. Law*, 1 Atk. 489; *Baylis v. Dineley*, 3 M. & S. 477; *Gibbs v. Merrill*, 3 Taunt. 307; *Reg. v. Lord*, 12 Q.B. 757; s.c. 17 L.J. M.C. 181.

(*e*) *Wright v. Snowe*, 2 De Gex & S. 321.

(*f*) 11 Geo. IV. & 1 Will. IV. c. 65, secs. 16, 17; 13 & 14 Vic. c. 60; 18 & 19 Vic. c. 43; 19 & 20 Vic. c. 120; 20 & 21 Vic. c. 13.

(*g*) 19 & 20 Vic. c. 120; post, p. 280.

(*h*) 25 & 26 Vic. c. 53, ss. 4, 116; c. 67.

(*i*) *Hargreave's Est.* 32 L.T. 203.

(*j*) *Kingham v. Lee*, 15 Sim. 396.

with the concurrence and consent of her husband, to sell standing timber, and the wife afterwards died; the husband, who thereupon became tenant by the curtesy, was restrained from cutting the timber, on a bill filed on behalf of the infant heir-in-tail (*k*). The principle of the decision is applicable to minerals.

A married woman may purchase any interest in land without the consent of her husband, and the conveyance is good during coverture till he avoids it; and if he does not avoid it, or consent to it, the feme coverte herself may, after the death of her husband, waive or disagree to it, nay, even her heirs may waive it after her, if she die before her husband, or if in her widowhood she did nothing to ratify and confirm the transaction (*l*).

The wife in conjunction with her husband, might under certain restrictions, at common law, make limited conveyances of her property which would be binding (*m*); and by statute 32 Henry VIII. c. 28, she was enabled, together with her husband, to grant leases for a limited period, but that statute, except as to leases made by persons having an estate in right of their churches, is now repealed (*n*). By the 3 & 4 Will. IV. c. 74, every married woman may by deed, but not by will, dispose absolutely of entailed freehold, as well as of copyhold lands, of any tenure, which she alone, or which she and her husband in her right, may be seized of, as effectually as if she were a feme sole, provided the husband concur in the deed, and it is otherwise made, acknowledged and executed in the manner pointed out in the Act; the husband's consent is dispensed with under certain circumstances (*o*). Alienation.

The Act does not apply to Ireland, but similar provisions are made for that country by another Act, 4 & 5 Will. IV. c. 92. A married woman may still, as before the Act, bind her interest by election, without a deed, acknowledged

(*k*) *Roberts v. Roberts*, Hard. 96.

(*l*) *Coke Litt.* 3<sup>a</sup>.

(*m*) *Whetstone v. Wentworth*,  
*Dyer*, 159<sup>a</sup>, 91<sup>b</sup>, 146<sup>b</sup>; *Jordan v.*  
*Wiles*, Cro. Jac. 332; *Smallman v.*  
*Agborow*, Cro. Jac. 417; *Rennie v.*

*Robinson*, 1 Bing. 147; 7 Moore,  
539.

(*n*) 35 sec. of 19 & 20 Vic. c. 120.

(*o*) 3 & 4 Will. IV. c. 74, secs. 15,  
16, 40, 77, 79, 80; *Shelford's Real*  
*Property Stats.* edit. 1863, p. 417.

under the Act (*p*). Other statutes affecting her lands have also been passed (*q*); she may disclaim any interest in lands by a deed executed in pursuance of the 8 & 9 Vic. c. 106, s. 7; and in conformity with the before-mentioned Act of 3 & 4 Will. IV. c. 74, and now by 19 & 20 Vic. c. 120, she and her husband have acquired a power of disposition over her mineral estates, which before, being only regarded as tenants for life punishable for waste, neither of them possessed (*r*). A married woman with the consent of her husband may obtain a declaration of title under a recent Act; and for the purposes of the Act, she is to be deemed a *feme sole* of all land which is settled to her separate use without restraint of alienation (*s*).

IDIOTS and  
LUNATICS.

At common law, an idiot or person of unsound mind was not bound by any act or deed unless made during a lucid interval, and if he agreed to purchase an estate, he might elect, but could not be compelled, to carry out the contract (*t*); but now the estates of idiots and persons of unsound mind are vested in their committees (*u*), and placed under the control of the Court of Chancery, by several Acts of Parliament, which will render all contracts relating to the interests of those persons, absolutely void, unless made in conformity with the provisions of those Acts (*v*).

When  
mines may  
be worked.

The language of Lord Loughborough in *Oxenden v. Compton* leads to the inference, that the Court of Chancery will sanction any dealing of the estate of the lunatic, which may fairly be considered advantageous to those whose interests are immediately to be affected by it, provided the act does not amount to speculation; where, for instance, as his lordship intimated, there was a colliery upon the estate, with the coal being worked, but almost

(*p*) *Barrow v. Barrow*, 4 Ka. & J. 409.

(*q*) See 11 Geo. IV. & 1 Will. IV. c. 65; 20 & 21 Vic. c. 13.

(*r*) 19 & 20 Vic. c. 120, ss. 32, 37, 39; and post, p. 280.

(*s*) 25 & 26 Vic. c. 53; c. 67, s. 36.

(*t*) Co. Litt. 3<sup>b</sup>; *Thompson v. Leach*,

Comb. 468; *Sugden's Vend. & Pur.* vol. ii. p. 208, 14th edit.; *Beaven v. Macdonnell*, 9 Ex. 309, 10 Ex. 184.

(*u*) *Ex parte Tabbart*, 6 Ves. 428.

(*v*) 11 Geo. IV. & 1 Will. IV. c. 65; 3 & 4 Will. IV. c. 74, s. 33; 13 & 14 Vic. c. 60; 16 & 17 Vic. c. 70; 18 & 19 Vic. c. 13; 19 & 20 Vic. c. 120; 20 & 21 Vic. c. 13; post, p. 283.



worn out, it would not be right to incur a considerable outlay ; but where by sinking lower, and erecting a fire-engine, coal might be raised at a profit, there the outlay would be justifiable (*w*).

Upon a petition in lunacy it appeared that the lunatic was tenant for life, without impeachment of waste, remainder to his first and other sons-in-tail, with various remainders over ; the lunatic was unmarried, coal was found upon the lunatic's estate, but in too small quantities to justify the sinking a shaft, but it was capable of being worked by means of a shaft in the adjoining land. Part of the estate of the lunatic was in mortgage, and the mortgagee was in possession, which reduced the income of the lunatic considerably. There were also other debts without any fund to answer them. Under these circumstances, the committee agreed with the owner of the adjoining land to work the coal ; which the master reported to be for the benefit of the lunatic. The master was attended by the next of kin, who were served with notice by direction of the court. The prayer of the petition was, that the report might be confirmed, and the Lord Chancellor confirmed the petition accordingly, alleging two reasons for so doing : 1st, Because the next of kin had an interest in the coal being worked ; 2nd, Because the heir-at-law had no interest, there being various remainders over (*x*).

In another case it was referred to the master to inquire, Leases. whether it would be for the benefit of the lunatic and his estate, to grant leases of coal mines, or seams of coal, belonging to him (*y*) ; and when expedient or necessary for the maintenance of a lunatic, the Committee of the Estate may now by order of the Lord Chancellor grant a lease of a mine already opened, and even mines unopened. The produce of newly-opened mines, while necessary for lunatic's maintenance, to be so applied, otherwise to be carried to a separate account, and be considered real estate (*z*).

(*w*) 2 Ves. 72.

(*x*) Ex parte Tabbart, 6 Ves. 428.

(*y*) Ex parte Percival, Shelford on

Lunacy, 2nd edit. pp. 254, 448.

(*z*) 16 & 17 Vic. c. 70, secs. 180,

181, 182 ; also 18 & 19 Vic. c. 13,

s. 1.

Partner-  
ship with  
lunatic. a

A firm was established to work a mine; each partner, after notice, was to be at liberty to sell his share, which the continuing partners were at liberty to purchase; the first partner gave notice to sell his share; the second partner afterwards became a confirmed lunatic; and the third partner, then purchased the share of the first, and filed his bill for a dissolution of the partnership; the committee of the lunatic then filed a cross-bill, and insisted upon the clause of pre-emption, and a right to participate in the purchase; but it was held, that the partners ought not to be compelled to carry on business with a lunatic or his committees; that the partnership must be dissolved; that notice of sale by one partner to the other before his lunacy, was sufficient to bind his committees, and determine any right of pre-emption; and that the real value of the undertaking could only be ascertained by a sale of the whole, as a "going concern" (a).

### BANKRUPTCY.

**ASSIGNEES OF BANKRUPTS.** *How property is vested in the Assignees under the Bankruptcy Acts, 1849, 1854, 1861—reputed Ownerships of Shares in a Company—order and disposition of the Bankrupt. When Assignees adopt the Contracts of a Bankrupt. Leases—when covenants not binding—settled Estates.*

**OFFICIAL LIQUIDATORS.** *The Companies Act, 1862—how property vests. Leases—covenants, when binding.*

ESTATES of  
BANK-  
RUPTS.

PRIOR to the recent alterations which were effected in the laws relating to bankrupts, the property of the bankrupt generally, passed to the assignees respectively, and now by the Bankruptcy Acts, 1849, 1854, and 1861, numerous provisions are made in reference to bankrupts' estates. By the Bankruptcy Act, 1849, it is provided that all the freehold and copyhold lands, and personal estate of the bankrupt, in the bankrupt's possession at the time of his bank-

Bank-  
ruptcy Act,  
1849.

(a) *Rowlands v. Evans, Williams v. Rowlands*, 31 L.J. Ch. 265; Jur. N.S. 88.

ruptcy, shall vest in the assignees by virtue of their appointment without any deed of conveyance (*b*). And in case of reputed ownership to chattels not in the possession of the bankrupt, they are to vest in the assignees by an order of the court; these latter provisions are not repealed by the Bankruptcy Acts, 1854, 1861, or either of them (*c*), and will often be found of great service to the creditors of an estate where the bankrupt has been engaged or concerned in mining pursuits, as it not unfrequently happens that a bankrupt is entitled to some considerable interest in mining property, which is neither in his possession nor in his name, as the legal owner. The 209th section of the Act relating to copyholds is repealed (*d*); and with respect to estates in tail, though they do not pass under the appointment, they are nevertheless to be disposed of in the manner directed in the Act for the benefit of the creditors (*e*). The assignees may redeem any property pledged by the bankrupt which could have been redeemed by the bankrupt himself (*f*); and the title of the assignee to the property sold cannot be impeached on account of any defect in the bankruptcy proceedings (*g*).

The Bankruptcy Act, 1854, makes no provision affecting directly the subject-matter of this work, but by the Bankruptcy Consolidation Act, 1861, it is provided that the official assignee, immediately on the adjudication, must take possession of the bankrupt's estate and retain possession thereof, till the appointment of a creditors' assignee, but such possession may be discontinued under the direction of the court; and upon the appointment of the creditors' assignee all the estate, both real and personal, of the

Bank-  
ruptcy  
Acts,  
1854-1861.

(*b*) 12 & 13 Vic. c. 106, secs. 141, 142, 209, 210; *Lushington v. Boldero*, 13 Beav. 418; *Plant v. Cotterill*, 5 H. & N. 430.

(*c*) Secs. 125, 127; *Ex parte Vauxhall Cy.* 1 Gl. & J. 101; *Lancaster Canal Co.* 1 Dea & C. 411; *Heslop v. Baker*, 6 Ex. 740; *Quartermaine v. Bittleston*, 13 C.B. 133; *Graham v. Furber*, 14 C.B. 134; *Hornsby v. Miller*, 28 L.J. Q.B. 99; *Reynolds*

& others, *Ass. v. Hall*, 28 L.J. Ex. 257; *Acraman & others, Ass. v. Bates*, 29 L.J. Q.B. 78.

(*d*) See Bankruptcy Act, 1861, sec. 114.

(*e*) See sec. 208; also 3 & 4 Will. IV. c. 74, secs. 55-73; *Jervis v. Taylor*, 3 B. & Ald. 557; *Doe d. Spencer v. Clark*, 5 B. & Ald. 458.

(*f*) Sec. 149.

(*g*) Sec. 131.



bankrupt shall be divested out of the official assignee and vested in the creditors' assignee (*h*). The creditors' assignee must then realise the estate of the bankrupt except debts not exceeding £10, which must be collected and recovered by the official assignee (*i*), and the court may give special directions for the disposal "for the benefit of the creditors, of any estate or interest at law or in equity which, at adjudication or afterwards, before order of discharge, a bankrupt has, in any copyhold or customary land, and to make an order vesting the land or such estate or interest as the bankrupt has therein, in such person and in such manner, as the court shall think fit" (*j*). "Where under any settlement or will a bankrupt non-trader shall be entitled to a life estate in remainder expectant upon the death or deaths of any previous tenant or tenants for life, with any remainder over to the bankrupt's issue, or the heirs of his body, or any of them as purchasers, the life-estate of such bankrupt non-trader shall not be sold before it falls into possession, without an express direction of the court" (*k*). The assignees must elect whether they will take and retain possession of property held under leases or agreements for leases (*l*); they may mortgage or pledge the bankrupt's property if a majority of three-fourths in value of the creditors present at a meeting called for the consideration of that question shall consent (*m*); and upon the production of a certificate of their appointment they may apply for and obtain a sequestration of, the profits of a benefice belonging to a bankrupt clergyman, without any writ or other proceeding for that purpose being had, or taken" (*n*).

Reputed  
ownerships.

Where shares of a company stand in the name of a bankrupt who was on all occasions the only apparent owner, and he kept possession of the certificates of the shares, but the shares belonged to another person, in whose favour there existed a secret declaration of trust, the shares

(*h*) 24 & 25 Vic. c. 134, secs. 108,  
117.

(*i*) Secs. 127, 128.

(*j*) Sec. 114.

(*k*) Sec. 115.

(*l*) Sec. 131; Goodwin v. Noble,  
27 L.J. Q.B. 204.

(*m*) Sec. 133.

(*n*) Sec. 135.

were held to be in the reputed ownership of the bankrupt (*o*); but in a subsequent case, a distinction is drawn between the above-mentioned case and that of a bankrupt who, prior to bankruptcy, had deposited certificates of shares in a coal and quarry company as security, where there was a printed notification on each share-certificate that no transfer could be made without the consent of the directors (*p*). Where a bankrupt pledges shares in a company which belonged to his wife before marriage, notice must be given to the company of the deposit, before bankruptcy, or they will be in the reputed ownership of the bankrupt (*q*).

A bankrupt before his bankruptcy deposited certificates of some shares in a German mining company for securing a loan of money, with an agreement accompanying the deposit, by which he engaged to complete the transfer of the shares when required. The documents were afterwards sealed up and entrusted to the bankrupt for safe keeping, where they remained till about three weeks before the bankruptcy, when they were reclaimed; and it was held that the shares were not in the order or disposition of the bankrupt at the time of his bankruptcy (*r*). A transfer of shares in a company was executed by a shareholder, a blank being left for the name of the transferee and for the date; but before the name of a purchaser could be inserted in the transfer, the transferror became bankrupt; and it was held by Vice-Chancellor Stuart, that the shares were in the order and disposition of the transferror at the date of his bankruptcy; but upon appeal the decision was reversed, it being considered that the shares were not either in the order, disposition, or reputed ownership of the transferror at that time (*s*).

A became bankrupt, being at the time possessed of some shares in an incorporated company, which were stand-

Order and disposition of bankrupt.  
Rights of assignees to adopt execution contracts.

(*o*) Ex parte Watkins, 2 M. & Ay. 348.

(*r*) Ex parte Richardson, 3 Dea. 496.

(*p*) Ex parte Harrison, 3 M. & Ay. 506.

(*s*) Morris v. Cannan, 31 L.J. Ch. 425.

(*q*) Ex parte Spencer, 3 M. & Ay. 697.

ing in his name in the company's books. Only £25 had been paid on each share, leaving £75 more to be paid. The assignees did not claim the shares till they had risen in value, when they demanded that their names should be registered as the owners. This the company refused to do, and on the case coming before the court in error, it was contended that the assignees were bound to have done some act within a reasonable time to testify their acceptance of the shares. That question, however, was not decided, but the judges held that in any event, reasonable time would not begin to run till some other party interested in the shares had taken some steps respecting them (*t*).

Leases.

The assignees of a bankrupt are not liable, as the assignees of a term, unless they have done some act which unequivocally indicates to the lessor that they have elected to take the benefit of the lease; merely carrying on a mine till a sale can be conveniently held, or the doing of any act necessary to prevent great loss or irreparable injury, would not be sufficient, even although a profit to the estate may have accrued therefrom. It is usual, in leases, for the lessee to covenant that he will not assign without consent of the lessor; such a covenant, although binding upon the lessee and his assigns, is not binding upon an assignee of a bankrupt, or an official liquidator of a company; but where a lease was granted to a person for twenty-one years, with a covenant that the lessee would not assign or underlet without the consent of the lessor, and that in case the lessee should, by his own act, or by act of law, lose or be deprived of the possession of the premises without the consent of the lessor, the lessor might re-enter; and the lessor was afterwards adjudicated bankrupt, and his assignees took possession of the demised property, and paid a half-year's rent, and then advertised the lease for sale; it was held that on the acceptance of the rent by the lessor, the assignees became entitled to the lease by contract with him and not by operation of law; consequently they were bound

When covenants not binding upon assignees, &c.



by all the covenants and could not sell or underlet without the lessor's consent (*u*).

A deed of partnership contained a proviso, that a withdrawing partner should not be entitled to credit for the value of the lease of certain mines vested in a trustee for all the partners, in shares, according to the capital contributed by them respectively, but that the account to be taken should consist only of his share in the assets of the partnership other than the value of the lease; and that in the event of bankruptcy of any partner, an account should be taken of his share and interest in the mines, the value of the lease, which was not to be taken into account, excepted; one of the partners having become bankrupt, it was held, that such a stipulation was a fraud upon the bankrupt laws, and void as against the assignees in bankruptcy (*v*).

If a power of sale over a settled estate is given to trustees at the request of a tenant for life, and such tenant for life afterwards becomes bankrupt, the power is not thereby extinguished, but may be exercised by the assignees and tenant for life jointly (*w*). Settled estate.

By the Companies Act, 1862, the official liquidator to be appointed under that Act, is to take into his custody or under his control all the real and personal property, effects, and things in action, to which the company is, or appears to be, entitled, and to sell and transfer the said real and personal estate, and "heritable and moveable property," and to do all acts and execute in the name and on behalf of the company, all deeds, receipts, and other documents necessary for effectually vesting the property in the purchaser, and for any of those purposes to use when necessary the company's seal (*x*). The shares or interest of any individual member of and in a company is declared to be personal and not real estate (*y*). The official liquidator of a company will thus often become entitled, *ad invitum*, to OFFICIAL LIQUIDATORS.

(*u*) Dyke v. Taylor, 6 Jur. N.S. 1329.

(*v*) Whitmore v. Mason, 31 L.J. Ch. 433; 2 Johns. & H. 204.

(*w*) Holdsworth v. Goose, 29 Beav. 111; s.c. 30 L.J. Ch. 188.

(*x*) 25 & 26 Vic. c. 89, secs. 92, 94, 95, 101.

(*y*) Sec. 22.

large mineral possessions; frequently he will find a covenant or condition in leases and other instruments restraining alienation without consent of the grantor, but such a clause will be as inoperative against him as against an assignee in bankruptcy, and he will be bound, notwithstanding such a covenant, to sell the whole of the property of the company, regardless of any restriction against alienation imposed by the grantor or entered into by the grantee (z).

**Leases.**

In pursuance of an arrangement made on behalf of a company with certain persons to purchase the beneficial interest in a colliery lease, agreed to be granted to them for a term of forty years, a lease was granted in March, 1842, to three persons as trustees for the company, for a period of forty years, at a fixed rent, together with a royalty; the lease contained a stipulation enabling the lessees, at the end of any period of three years from its commencement, to determine the lease by giving twelve months' notice; the company entered into possession in December, 1841, and remained in such possession until November, 1842, when the working proving unprofitable was abandoned, and never afterwards resumed; in January, 1850, the company was dissolved, and its affairs ordered to be wound up under the provisions of the winding up Acts; the lessor became bankrupt in August, 1853, but some time prior to his bankruptcy, his interest in the mine became vested in the plaintiff. In May, 1852, the official manager of the company, under protest that the lease was not binding on the company, gave notice to terminate the lease on the 31st May following, when one of the triennial periods expired, and on the 23rd February, 1853, the plaintiff filed his bill against the official manager, alleging that the company had accepted the lease and was bound thereby, and praying that the official manager might be ordered to pay the arrears of the stipulated rent since March, 1842, together with compensation for all breaches of covenant; but it was

(z) *Whitmore v. Mason*, ante, p. 227.

held, that no relief in the nature of specific performance, nor any equitable relief, could be granted either against the persons to whom the demise was made, or against the company in respect of their occupation, the rights of the plaintiff, if any, being legal. The relation between the occupiers and the lessee, as *cestui que trust* and trustee, cannot give any equitable right to the lessor, who claims by a title paramount (a).

### MORTGAGED PROPERTY.

**MORTGAGEES.** *Mortgagee in fee in possession—his right to search for and work Minerals—Consequences. Receiver. Accounts and Inquiries taken and directed by the Court of Chancery—Statute of Limitation. Foreclosure and Redemption Suits. Mortgagees' liability to Strangers for acts of Mortgagors. When Mortgagee will be considered to have adopted the agreements of Mortgagor. Leases by Mortgagees—Mortgagor.*

A MORTGAGEE in fee in possession, being regarded at law as the absolute owner of the inheritance, may explore and take minerals from the mortgaged lands, as well as continue the search after minerals in mines already opened, but equity will restrain him from opening new mines until foreclosure, on the ground of committing waste (b).

If a mortgagee in possession, having an insufficient security, open mines or quarries on the mortgaged estate, and works them without having had an authority given to him by the mortgagor for that purpose, he will be charged with the profits and disallowed his expenses in case of loss (c), but if his security is sufficient, and he opens mines under similar circumstances, he will be charged with his receipts, but disallowed his expenses, whether the mine prove profitable or not, as he has no right to speculate with the pro-

(a) *Walters v. Northern Coal Mining Co.* 5 De G. Mac. & G. 629; 2 Jur. N.S. 1; 25 L.J. Ch. 633. *Hardy v. Reeves*, 4 Ves. 480; *Sandon v. Hooper*, 6 Beav. 249.

(c) *Withrington v. Banks*, Sel. Ca. Ch. 30; *Millett v. Davey*, 32, L.J. Ch. 122.

(b) *Farrant v. Lovel*, 3 Atk. 723;



perty (*d*). If a mortgagee comes into possession of open mines he is not bound to work them, but if he does, he need not lay out or advance more than a prudent owner, and he cannot be charged with mismanagement, on the ground of having omitted to make the necessary advances for effectually exploring the mines (*e*); but he may, it would seem, be held responsible for unnecessary expenses, or for wilful neglect, and he is bound to prevent the premises from falling into decay (*f*).

Receiver.

A receiver or manager of mines will be appointed at the instance of one of several part owners; because a mine is regarded as a species of trade (*g*), and also on account of the difficulty of management, each owner having a separate right of working, but a receiver will not be appointed at the instance of a mortgagor against a mortgagee in possession, for omitting to lay out more than a prudent owner would advance. On the other hand, if there is good reason to think that a mortgagee in possession is recklessly working mines, the court will direct an inquiry as to the manner of working and their condition, even if no suggestion be made, by the bill, of undue working (*h*).

Accounts  
and in-  
quiries  
directed.

A mortgagee who holds property in pledge is responsible for it in its integrity, therefore a mortgagee of land containing beneath the surface unopened coal fields, who allowed an owner of adjacent coal mines to explore and work the coal under the mortgaged lands, was held responsible for such working, and, besides the common decree, the court, at the instance of the mortgagor, directed an inquiry and account to be taken of all coal worked and of the proceeds. In taking an account of the quantity and value of the coal gotten six years before the bill was filed, by the adjoining owners, who were strangers to the mortgagors, it

(*d*) *Hughes v. Williams*, 12 Vesey, 493; *Thornycroft v. Crockett*, 16 Simon, 445; *King v. Smith*, 2 Hare, 241; *Hood v. Easton*, 20 Jur. 729; s.c. 2 Giff. 692.

(*e*) *Rowe v. Wood*, 2 Jacob. & W. 555.

(*f*) *Hanson v. Derby*, 2 Vernon,

392; *Godfrey v. Watson*, 3 Atk. 518; see 8 & 9 Vic. c. 56; *Seton on Decrees*, vol. i. p. 398.

(*g*) *Jefferys v. Smith*, 1 Jac. & W. 298; *Rowe v. Wood*, *suprà*.

(*h*) *Mulhallen v. Marum*, 3 Dru. & War. 317.

was held that the Statute of Limitations did not apply, but this part of the decision was afterwards questioned on appeal (*i*).

A mortgagor who is aware that the mortgagee in possession is working mines under the mortgaged premises, and for a number of years allows the working to go on without objection or complaint, will not be allowed in a foreclosure suit to surcharge the mortgagee, with the value of the ores raised by him, or his lessees, or for damage necessarily done to the surface by reason of such working (*j*). Foreclosure.

An overstatement on the part of mortgagees in possession of a colliery, respecting the balance represented by them, as remaining due on their mortgage, coupled with a refusal to furnish an account to the mortgagors, except on being paid the expenses of so doing, does not amount to such vexatious conduct on the part of the mortgagees, as to induce the court to deprive them of their costs of a redemption suit, and, on their appealing from a decree disallowing such costs, they were declared to be entitled, not only to such costs, but to their costs of appeal (*k*). Redemption.

Where a trespass was committed on the plaintiffs' mine, and an air-course, and level roads, made through it underground, to connect adjoining collieries, and large quantities of the defendants' coals thereby fraudulently gotten and removed without their knowledge, it was held, first that the mortgagees could not be made accountable for any portion removed by their mortgagor while they allowed him to remain in possession, notwithstanding that the proceeds of the coal, so wrongfully removed by him, had found their way, week by week, but without notice of the fraud, into the mortgagees' hands, and notwithstanding that they continued the use of the air-course, and roads, after taking possession, and retained in their employment as manager of the collieries the person by whose agency the fraud had When mortgagee liable to strangers, for acts of mortgagor.

(*i*) *Hood v. Easton*, 2 Giff. 692; 2 Jur. N.S. 729, 917.

(*k*) *Norton v. Cooper*, 5 De G. Mac. & G. 728.

(*j*) *Millett v. Davey*, 32 L.J. Ch. 122.

been perpetrated. Secondly, that the court had no jurisdiction to give the plaintiffs compensation in respect of consequential injury, by reason of large portions of their coal being rendered unworkable and useless to them. Thirdly, that the mortgagees could not be allowed to retain the use of the air-course or roads, although the continuance of that user might be no special injury to the plaintiffs. Fourthly, that not having themselves made such apertures, they could not be ordered to fill them up. Fifthly, that all the proceeds having been traced to the mortgagees, and no portion retained by the agent, the latter could not in a court of equity be made personally chargeable for the value of the coal removed, notwithstanding his own fraudulent conduct in the transaction. A decree was made accordingly, and for an account against the mortgagor and mortgagees, and as to the allowance to be made to the defendants in respect of the coal for which they were held accountable (*l*).

Adopting  
agreements  
of mort-  
gagor.

An Act of Parliament authorized the lessees of mines to make a railroad to a canal through the intervening lands, on making compensation; the lessees entered into an agreement with a mortgagor in possession for making the railroad and paying an annual rent to him; the mortgagee afterwards entered into possession, and received the rent on several occasions; held that the mortgagee and those claiming under him were bound by the agreement (*m*).

Granting  
lease.

In the absence of a power reserved by a mortgagor, or given to a mortgagee, both must concur in a lease of the minerals; but a mortgagor may grant a lease of his equity of redemption (*n*), and a mortgagee, to prevent an apparent loss, or under other circumstances of absolute necessity, will have the sanction of a court of equity to grant leases (*o*). And now, by the 23 & 24 Vict. c. 145, there is, under some circumstances, an implied power in every

(*l*) *Powell v. Aiken*, 4 Kay & J. 343.

(*m*) *Mold v. Wheatcroft*, 27 Beav. 510.

(*n*) *Omelaughland v. Hood*, 1 Rol ab. 874-6.

(*o*) *Hungerford v. Clay*, 9 Mod. 1; *Lucam v. Mertins*, 1 Wils. 34.



mortgagee to sell the whole or any part of the mortgaged premises, and to have a receiver appointed, unless the deed contains an express declaration to the contrary (*p*). If the mortgagor grants a lease after executing the mortgage, the mortgagee, without notice, may evict the lessee, and bring an action for mesne profits (*q*); or if the mortgagee acknowledges the lease, the lessee will be justified, on notice, in paying the rent to the mortgagee (*r*).

(*p*) Secs. 11, 32.

(*r*) *Pope v. Biggs*, 9 B. &

(*q*) *Doe d. Roby v. Maisey*, 8 B. 245.  
& C. 767; *Doe d. Fisher v. Giles*, 5  
Bing. 421.

## CHAPTER XII.

## OWNERSHIPS IN MINES, MINERALS, AND QUARRIES.

## CORPORATIONS.

## ECCLESIASTICAL.

## ELEMOSYNARY.

## MUNICIPAL.

## ECCLESIASTICAL CORPORATIONS.

(AGGREGATE AND SOLE.)

*Right to work Mines—Prescriptive Right. Powers of Alienation—Enabling and Restraining Statutes, 32 Hen. VIII. c. 28; 1 Eliz. c. 19; 1 James, c. 3; 13 Eliz. c. 10—18 Eliz. c. 11; 39 & 40 Geo. III. c. 41. Concurrent Leases. 6 & 7 Will. IV. cc. 20, 64; 5 Vic. c. 27 (sess. 2); 5 & 6 Vic. c. 108; Mining Leases—Leases of Water, Way-leaves, and other Easements—Surrender of existing Leases—Consents—Premiums—Ecclesiastical Commissioners. 14 & 15 Vic. c. 104; 21 & 22 Vic. c. 57; 23 & 24 Vic. c. 124; 24 & 25 Vic. c. 105; 25 & 26 Vic. c. 52. Leases by Incumbents—consents generally.*

**IRELAND.** *Mining Leases—Enquiries as to Mines before Conveyance in Fee—Rent on Mines profitably worked.*

Right to  
work  
mines.

ECCLESIASTICAL corporations aggregate had at common law an absolute estate in fee-simple of all lands held in their corporate capacity; by virtue of which they might open new mines, or work old ones at pleasure (a); corporations sole, on the other hand, were more in the position of ordinary tenants for life, which only enabled them to work old mines, but not to open new ones without consent of their superiors and the patron (b); and it is doubtful

(a) Co. Litt. 44<sup>a</sup>; Bishop of London v. Web. 1 P. Wms. 527; Bishop of Winchester v. Knight, 1 P. Wms. 406; 2 Bl. Com. 318; Duke of Marlborough v. St. John, 5 De G. & S. 179.

(b) Knight v. Moseley, Amb. 176; Duke of St. Albans v. Skipwith, 8 Beav. 354; Huntley v. Russell, 18 L.J. Q.B. 239; Duke of Marlborough v. St. John, 5 De G. & S. 179.

whether they can now do so, without also obtaining the consent of the Ecclesiastical Commissioners (*e*). Recently, the authority of the bishop or the incumbent, even with such consents as aforesaid, to open new mines, has been called in question; but in the case of the Duke of Marlborough *v.* St. John, Vice-Chancellor Parker held, that the incumbent, with the consent of the patron and ordinary, could at common law make a complete alienation of the living, or commit waste by the felling of timber (*d*); and Vice-Chancellor Wood adopting that opinion, has since said that “the principle would go a considerable way to the opening of mines, because, in either one case or the other, it is an alienation of the inheritance (*e*).”

A prescriptive right to work mines may, it would seem, also be acquired in lands belonging to the church; but where coals had, at different times since 1756, been gotten from the glebe lands with the consent of the vicars, for the time being, by persons working the adjoining collieries, the working being conducted solely by underground passages from the adjoining collieries, without entering upon or interfering with the surface of the glebe; it was held that no presumption could be drawn from these facts, that there had formerly been a grant authorizing the vicars to open mines (*f*); and consequently, that a prescriptive title to do so had not been established.

Eventually, several enabling as well as disabling statutes were passed, which materially altered the rights of all ecclesiastical persons holding the possessions of the church. By 32 Henry VIII. c. 28 (*g*), every ecclesiastical corporation, aggregate or sole, who was seized in fee, except parsons or vicars, might grant leases by deed for the term of twenty-one years, or for three lives, on condition that the accustomed rent at least should be reserved, and that the lease should not be without impeachment of waste;

(*e*) *Holden v. Weekes*, 30 L.J. Ch. 35; post, p. 246.

(*d*) 5 De Gex & Sm. 174; s.c. 21 L.J. Ch. 381.

(*e*) *Holden v. Weekes*, 30 L.J. Ch. 35.

(*f*) *Bartlett v. Phillips*, 4 De G. & J. 414.

(*g*) Repealed except as to Church property 19 & 20 Vic. c. 120, sec. 35.

Prescriptive right.

Statutory powers of alienation.

Enabling statutes.



Restraining  
statutes.

and such lease required no confirmation by the crown or patron; it is doubtful whether the statute applies to copyhold lands (*h*). By 1 Elizabeth, c. 19, and 1 James, c. 3, all alienations, assurances, gifts, grants, feoffments, leases, fines, charges, or other conveyances, or estates, to be had, made, done, or suffered by any archbishop or bishop, of any of their possessions, other than for the term of twenty-one years, or three lives; and, unless the old accustomed yearly rent, or more, should be reserved, are declared void to all intents and purposes; by the 13 Elizabeth, c. 10, parsons and vicars, and other holders of spiritual livings, are placed upon the same footing as archbishops and bishops, so as to make their alienation also void if they exceed the term or period above mentioned. Leases granted under these restraining statutes, did not bind the successors without confirmation, where confirmation was before necessary (*i*); but such leases were nevertheless good, during the life of the lessor (*j*), and may be confirmed by his successor (*k*). Mere acceptance of rent reserved under a lease, by the successor, will only create a tenancy from year to year; which may be determined at any time, by a regular notice to quit (*l*). And if a lease was made without the consent of the patron paramount, no confirmation of such lease by the immediate patron, or by a successor of the lessor, will remedy the want of a previous consent (*m*). By 39 & 40 Geo. III. c. 41, the before-mentioned Acts of 32 Henry VIII., and the 1st and 13th of Elizabeth, are explained and amended, so far as relates to the power of the persons enabled by those acts to grant leases, to join together in one lease lands not usually let together, or to divide lands usually leased together. The Statutes of Elizabeth and George are silent upon the subject of waste; but, whether the equity of those statutes restrain the

(*h*) Rowden v. Maltster, Cro. Car. 44. Pennington v. Cardale, 3 H. & N. 666.

(*i*) Co. Litt. 44<sup>b</sup>.

(*l*) Doe d. Brammall v. Collinge,

(*j*) Doe d. Bryan v. Bancks, 4 B. & Ald. 407.

7 C.B. 960.

(*k*) Edwards v. Dick, 4 B. & Ald. 217; Doe v. Tanriere, 12 Q.B. 998;

(*m*) Doe d. Brammall v. Collinge, *supra*.

granting of leases of mines and quarries not previously worked or opened, and consequently from committing waste, is open to doubt (*n*).

The before-mentioned statutes are also silent on the power of ecclesiastical persons to grant concurrent leases, and also new leases, before the expiration of the old ones; but concurrent leases under the statute of 13th Elizabeth, c. 10, have been since prohibited, except under certain circumstances, by the 18th Elizabeth, c. 11 (*o*). The statute of 1st Elizabeth, c. 19, had been previously decided not to prohibit the granting of concurrent leases, except leases in reversion (*p*). But the whole subject of granting concurrent leases, and also new leases before the expiration of the old ones, whether under the statutes of Elizabeth, or any other power, has undergone revision by the statutes 6 & 7 Will. IV. cc. 20, 64. By the statute 6 & 7 Will. IV. c. 20, it is provided that "no archbishop or bishop, ecclesiastical corporation, sole or aggregate or other spiritual person, shall grant any new lease, by way of renewal of any lease, which shall have been previously granted of the same for two or more lives, until one or more of the persons for whose lives such lease shall have been so made shall die; and then only for the surviving life or lives, and for such new life or lives as, together with the life or lives of such survivor or survivors, shall make up the number of lives, not exceeding three in the whole, for which such lease shall have been so made as aforesaid; and that where any such lease shall have been granted for forty years, such archbishop, bishop, ecclesiastical corporation, sole or aggregate, or other spiritual person, is prohibited from granting any lease, by way of renewal of the same, until fourteen years of such lease shall have expired; and that where any such lease shall have been made as aforesaid for thirty years, no grant can be made of any new lease, by way of renewal of the same, until ten

Concurrent  
leases.

(*n*) Dean and Chap. of Worcester, 6 Rep. 37; Doe d. Brammall v. Collinge, 7 C.B. 960; Holden v. Weekes, 30 L.J. Ch. 35.

(*o*) Moor, 875; Co. Litt. 45b; 2 Brownl. 134, 141, 164.

(*p*) Fox v. Collyer, And. 65; Lepur v. Wroth, 1 Leon. 35; Grindall's case, 4 Leon. 78; Bridg. by Ban. 136. But see also Co. Litt. 44b; 5 Co. 2; Moor. 253; 1 Leon. 59; Cro. Eliz. 141.

years of each lease shall have expired ; and where any such lease shall have been granted for twenty-one years, no grant of any new lease can be made, by way of renewal of the same, concurrently therewith, until seven years of such lease shall have expired ; and that where any such lease shall have been granted for years, no grant can be made of any lease by way of renewal of the same or otherwise, for any life or lives." By the said Act, certain other leases, upon different terms and for shorter periods than those above mentioned, may be granted, and exchanges also may be thereby effected under certain conditions (*q*).

Mining  
leases.

During the reign of Her present Majesty (Victoria) several Acts of Parliament have been passed, under and by virtue of which ecclesiastical corporations, aggregate and sole, are enabled to grant leases for long terms of years, and special provisions are inserted respecting mines and mining leases. By 5 Vic. (sess. 2), c. 27, entitled "An Act for enabling Incumbents of Ecclesiastical Benefices to demise the Lands belonging to their Benefices on farming Leases," all mines and minerals, by section 1, are to be reserved out of such leases. This Act does not repeal the before-mentioned statute 13 Elizabeth, c. 10 ; and therefore a rector may demise his glebe under the statute of Elizabeth, in manner pointed out by that statute, notwithstanding the subsequent statute of Victoria (*r*). By 5 & 6 Vic. c. 108, entitled "An Act for enabling Ecclesiastical Corporations, aggregate and sole, to grant Leases for long terms of years," power is given to grant mining leases for any term not exceeding sixty years. By section 6 it is enacted "that it shall be lawful for any ecclesiastical corporation, aggregate or sole (with some unimportant exceptions), from time to time, with the consent or consents hereby required, to grant or demise by lease, for any term not exceeding sixty years, to take effect in possession, and not in reversion or by way of future interest, any mines, minerals, quarries, or beds belonging to such corporation,

(*q*) See 4 Geo. II. c. 28, s. 6, as to renewal without surrender of under-leases.

(*r*) *Jenkins v. Green*, 28 Beav 87.



together with the right of working or of opening and working the same, and of working any adjacent mine, by way of outstroke or other underground communication, and together also with such portion of land belonging to such corporation, and all such rights and liberties of way and passage, and other rights, easements, and facilities for the opening and working of all such mines, minerals, quarries, or beds, and leading and carrying away the produce thereof, or otherwise incident to mining operations, as shall be deemed expedient; and every such lease shall contain such reservations by way of rent, royalty, or share of the produce in kind, all or any thereof, or otherwise, and such powers, provisoes, restrictions, and covenants, as shall be approved by the Ecclesiastical Commissioners for England, due regard being had to the custom of the country or district within which such mines, minerals, quarries, or beds are situate; and no fine, premium, or foregift, nor any thing in the nature thereof, shall be taken for or in respect of any such lease."

By section 4 it is enacted "that it shall be lawful for any ecclesiastical corporation, aggregate or sole, except as aforesaid, from time to time after the passing of this Act, with such consent and under such restrictions as are hereinafter mentioned, by any deed or deeds duly executed, to grant by way of lease, unto any person or persons whomsoever, any liberties, licenses, powers, or authorities to have, use, or take, either in common with or to the exclusion of any other person or persons, all or any of the water flowing, or which shall or may flow, or be made to flow, in, through, upon, or over, any lands or hereditaments belonging to such corporation, in his or their corporate capacity, or any part or parts thereof (except as hereinafter is mentioned), and also any way-leaves or water-leaves, canals, watercourses, tramroads, railways, and other ways, paths, or passages, either subterraneous or over the surface of any lands, store-yards, wharfs, or other like easements or privileges in, upon, out of, or over any part or parts of the lands belonging to such corporation, in his or their corporate capacity (except as hereinafter is mentioned), for any

Leases of  
water,  
way-leaves,  
and other  
easements.

term or number of years not exceeding sixty years, to take effect in possession, and not in reversion, or by way of future interest, so as there be reserved on every such grant by way of lease as last aforesaid, payable half-yearly or oftener, during the continuance of the term of years thereby created, the best yearly rent or rents, either in the shape of a stated or fixed sum of money, or by way of toll or otherwise, that can be reasonably had or gotten for the same, without taking any fine, premium, or foregift, or any thing in the nature of a fine, premium, or foregift, for the making thereof (other than any provision or provisions which it may be deemed expedient to insert in any such grant, rendering it obligatory on the grantee or lessee, or grantees or lessees, to repair or contribute to the repair of any roads or ways, or to keep open or otherwise use in any specified manner, any water or water-course to be comprised in or affected by any such grant or lease); and so as there be contained in every such grant by way of lease as last aforesaid a condition or power of re-entry, or a power to make void the same, in case the rent thereby reserved or made payable, or any part thereof, shall not be paid within some reasonable time to be therein specified in that behalf; and so as the respective grantees or lessees do execute counterparts of the respective grants or leases, and generally that in and by each or any such grant by way of lease as last aforesaid there shall or may be reserved and contained any other reservations, covenants, agreements, provisoes, or stipulations whatsoever, not inconsistent with those hereby required to be reserved or contained, in each such grant, by way of lease, which it shall be deemed expedient to introduce therein."

Surrender  
of existing  
leases.

Existing leases of mines, minerals, and quarries may be surrendered and new leases granted in lieu thereof, but it is not necessary before granting leases under the Act to surrender under-leases (s).

Consents  
to leases.

By section 21 the consent of each person, whose consent is required by the said Act to be given to any deed, must be testified, by such person being made a party to such

deed, and duly executing the same ; the 23rd section refers to the amount to be obtained when the Duke of Cornwall is interested ; the 24, 25, and 26 sections to the case of persons who are incapacitated or under disabilities ; the 27, 28, and 29 sections to ecclesiastical corporations. And by section 20 it is provided “ that each lease or grant to be made or granted under the provisions of the Act shall be made with the consent of the said Ecclesiastical Commissioners for England, and also with such further consent as hereinafter mentioned ; (that is to say) each lease or grant granted or made by any incumbent of a benefice with the consent of the patron thereof ; and each lease or grant by any corporation, either aggregate or sole, under the provisions of this Act, of any lands or houses, mines, minerals, quarries, or beds, of copyhold or customary tenure, or of any watercourses, ways, or easements in, upon, over, or under any such lands, where the copyhold or customary tenant thereof is not authorized to grant or make leases or grants, for the term of years intended to be created by such lease or grant, without the license of the lord of the manor ; shall be made with the consent of the lord for the time being of the manor of which the same lands or houses, mines, minerals, quarries, or beds shall be holden, in addition to the other consents hereby made requisite to the validity of such lease or grant ; and such consent when given amounts to a valid license to lease or grant the same lands or houses, mines, minerals, quarries, or beds, watercourses, ways, or easements (as the case may be), for the time for which the same shall be expressed to be demised or granted by such lease or grant.”

Ecclesiastical Commissioners.

Section 30 enacts “ that if, in the case of any lease, grant, or confirmation granted or made under this Act, any fine, premium, or foregift, or anything in the nature thereof, shall directly or indirectly have been paid or given by or on behalf of the lessee or grantee, and taken or received by the lessor or grantor, such lease, grant, or confirmation shall be absolutely void ;” but by the 1st section of 21 & 22 Vict. c. 57 Ecclesiastical Corporations are empowered to grant mining leases, in consideration, or

Premiums.



partly in consideration, of premiums, or no premiums, and upon such other terms as the Ecclesiastical Commissioners may approve.

Ecclesiastical Commissioners.

By 14 & 15 Vic. c. 104, s. 9, entitled "An Act to facilitate the Management and Improvement of Episcopal and Capitular Estates in England," any ecclesiastical corporation, with the approval of the Church Estate Commissioners, may grant mining leases of any lands purchased or acquired under that Act, for such considerations, upon such terms, and generally in such manner, as such commissioners, under the circumstances of the case, may think fit; and such commissioners may require that any portion of the rent received on such lease shall be invested and disposed of in the manner specified in the said Act. By section 2, provision is made for apportionment of rent on surrender of part of the lands comprised in any lease under the Act; and by section 2 of 17 & 18 Vic. c. 116, the above provision for apportionment of rent is extended to sales, exchanges, or enfranchisements; and further provision has been made in reference thereto by the 28th section of 23 & 24 Vic. c. 124. The Act is limited to three years (*t*), but has since been continued till the end of the session of Parliament next after the 1st January, 1863 (*u*).

21 & 22  
Vic. c. 57.

By the 21 & 22 Vic. c. 57, the before-mentioned Act of 5 & 6 Vic. c. 108 is amended; and mining leases may be granted as before stated in consideration of a premium, and otherwise, as therein provided for; by section 2, provision is made for the application of all monies received by way of premium, rents, or royalties; and by section 3<sup>1</sup> for raising money to be paid for equality of exchange or partition; and by section 4 it is provided that "For all or any of such purposes as aforesaid, it shall be lawful for every such ecclesiastical corporation, with such approval and consents as aforesaid, from time to time to enter into, make, and execute such contracts and agreements, and to

Contracts and surrenders.

(*t*) 17 & 18 Vic. c. 116, 19 & 20 Vic. c. 74; 20 & 21 Vic. c. 74 & 24 & 25 Vic. c. 131. The estates of the Archdeaconry of Rochester are vested in the Ecclesiastical Commissioners by this last statute.

(*u*) The meaning of Ecclesiastical Corporation is defined by section 11, and by section 3 of 24 & 25 Vic. c. 105, the said expression is extended, so as to include any rector, vicar, perpetual curate, or incumbent.

grant such licences or permissions to search for mines, and such other powers preliminary to or consequent upon any such contract, and also to alter, vary, or rescind the same, and accept surrenders of any lease or leases, and release any lessee or lessees in respect of breaches of covenant, in such manner and for such considerations as to the said commissioners shall appear advisable; and the lands, with respect to which any contract shall be abandoned, or surrender taken, shall be subject to all the powers and provisions of the said recited Act and of this Act; and all contracts and agreements so entered into by any person as aforesaid in his corporate capacity shall be binding upon his successors, and may be enforced against them."

And in cases of sales of any portion of property comprised in a lease, the rent is to be apportioned (section 8), and by section 9 it is provided that "No lease of any lands pur-  
 No lease to be granted except at rackrent.  
 chased or acquired, or in which the estate or interest of a lessee, or of a holder of copyhold or customary land, shall be purchased or acquired by any ecclesiastical corporation under this Act, shall (except under the express power contained in the said Act of the 5th & 6th Vic. or in this Act) be made or granted otherwise than from year to year, or for a term of years in possession, not exceeding fourteen years, at the best annual rent that can be reasonably gotten, without fine, and the lessee not to be made dispunishable for waste or exempted from liability in respect of waste."

By 23 & 24 Vic. c. 124, s. 2, the lands of the see of any archbishop or bishop of England are to be vested in the Ecclesiastical Commissioners on the next avoidance; by section 22, "The said Ecclesiastical Commissioners, or any eccle-  
 How to estimate the value of mining leases.  
 siastical corporation, aggregate or sole, in carrying out the powers of leasing mines and minerals vested in them, shall in the granting to the lessees of mines and minerals holden of the Ecclesiastical Commissioners or any ecclesiastical corporation, aggregate or sole, whether for years or for lives, an extended term or estate therein, and fixing the terms of such grant, have regard to the value of the estate and interest of the lessees of all such mines and minerals under

any lease or leases heretofore ordinarily renewable on the payment of a fine, and shall as a rule, in computing such value, estimate and include an extension of the existing unexpired term or estate of the lessees to the 11th day of October, 1884, at the accustomed rate of fine; and in the case of such of the said leases for lives as, according to the expectancy of human life, according to the life tables which are appended to the twelfth annual report of the registrar-general of births, deaths, and marriages in England, would not determine until after the said 11th day of October, 1884, shall have regard to the actual value of the estate and interest of the lessees."

Differences  
to be re-  
ferred to  
arbitration.

"In case any such lessee shall require any extended term in such mines and minerals to be granted to them, and any difference shall arise between the said Ecclesiastical Commissioners or other ecclesiastical corporation and such lessees thereupon, or as to the value so to be estimated, or as to the rents to be reserved, or the term of years to be granted, or other the terms and conditions on which such lease for any extended term or estate shall be granted, either party may require the other party to join in referring to arbitration the matter or matters so in difference, and the same shall be referred to arbitration." Other questions arising under that and some of the previous Acts may also be referred to arbitration in the manner pointed out in the Act (v).

24 & 25  
Vic. c. 105.

By 24 & 25 Vic. c. 105, it is provided that it shall not be lawful for any prebendary of any prebend not being a prebend of any cathedral, or collegiate church, rector, vicar, perpetual curate, or incumbent, who after the passing of that Act might become possessed of or entitled to any manors, lands, tenements, or hereditaments belonging to any ecclesiastical benefice in England, to make any grant by copy of court roll or lease, in consideration of any fine, premium, or foregift, but the same may, by any rector, vicar, perpetual curate, or incumbent, appointed after the passing of the Act, be leased, sold, exchanged, enfranchised, or disposed of under the provisions of the before-mentioned

(v) 23 & 24 Vic. c. 124, secs. 23, 24, 25, 33, 41.



Acts of 5 & 6 Vic. c. 27; 5 & 6 Vic. c. 108; 21 & 22 Vic. c. 57.

Notwithstanding anything contained within the 11th section of the 14 & 15 Vic. c. 104, any rector, vicar, perpetual curate, or incumbent, shall have such and the same powers of sale, exchange, and enfranchisement as are possessed by any ecclesiastical corporation, sole or aggregate, under any Act now in force; and the provisions of the 23 & 24 Vic. c. 124 are, so far as the same relate to powers for the raising or application of money by trustees, allowances to lessees, arbitration, valuation, rate of interest, apportionment of rent, and substitution of titles on exchange, be applied, *mutatis mutandis*, to sales, exchanges, or enfranchisements of any manors, lands, tenements, or hereditaments in this Act comprised; but the proceeds of any such sales or enfranchisements, and any monies received by way of equality of exchange, shall be applied according to the provisions in that behalf contained in the said Acts 5 & 6 Vic. c. 108, and 21 & 22 Vic. c. 57.

Rectors  
same  
powers of  
sale as ec-  
clesiastical  
corpora-  
tions.

By the 25 & 26 Vic. c. 52, it is provided that the prohibition to make any grant by copy of court roll or lease contained in the first section of the 24 & 25 Vic. c. 108 shall not only extend to grants of the said manors, lands, tenements, and hereditaments made in consideration of any fine, premium, or foregift, but shall also extend to all grants or leases of such manors, lands, tenements, and hereditaments made for any longer term, or in any other way than according to the provisions of the several statutes mentioned in the said first section and in the third section of the said Act (*w*). The prebendary of any prebend, not being a prebend of any cathedral or collegiate church, shall have such and the same powers of sale, exchange, and enfranchisement as by the third section of the said Act are given to rectors, vicars, perpetual curates, and incumbents; and the provisions and enactments contained in the said third section shall apply to sales, exchanges, and enfranchisements made by any such prebendary, and to the proceeds thereof (*x*). Notwithstanding the before-mentioned

25 & 26  
Vic. c. 52.

Leases  
by incum-  
bents to  
open new  
mines.

Acts, the power of an incumbent of a living, and even of all ecclesiastical corporations sole, to grant a lease to open new mines has recently been questioned. The earliest authority on the subject is the case of the Dean and Chapter of Worcester (*y*), where it was held by the court that the making of a lease, without impeachment of waste, by an ecclesiastical body, was within the equity of the restraining statutes of Elizabeth. So far an opinion seems to have been pronounced. Then, in the Countess of Rutland's case (*z*), (the report of which, both in Levinz and Siderfin, is meagre and unsatisfactory); a prohibition being moved for against the opening of mines, the court doubted "about the prohibition," because, they said, "if so, the mines could never be opened at all." On looking through all the subsequent authorities, it seems clear, beyond dispute, that the incumbent cannot open mines without the concurrence of the patron and ordinary; and it is also clear and beyond dispute, that the patron is the proper person to institute a suit with reference to the opening of mines, and the only person who can properly interfere, unless it be the ordinary who may interfere to prevent collusion between the patron and the incumbent (*a*). In *Bartlett v. Phillips* (*b*) it was not by any means concluded that it was not in the power of the patron and ordinary to grant the lease. On the contrary, Lord Justice Knight Bruce very carefully guards himself against any such inference. The sole question there was, whether any such concurrence could be presumed to have taken place at all, and not simply whether it could be presumed to have taken place anterior to the restraining statutes; and Lord Justice Knight Bruce says, "The present vicar's claim is not supported by any grant, instrument, or documentary evidence, existing or proved to have existed, nor has any consent or acquiescence on the part of the present or any former patron, or the present or any former ordinary, been shown;" clearly implying that he had not made up his mind that such a consent

(*y*) 6 Co. 37.  
(*z*) 1 Lev. 107.

(*a*) *Knight v. Moseley*, Amb. 176.  
(*b*) 4 De G. & J. 414.

would not have been of importance, if proved. Moreover, the Ecclesiastical Commissioners have power to grant leases to open new mines upon certain terms and conditions, provided that they do not prejudice any power, under any existing right or authority; which indicates a doubt, to say the least of it, whether there were not other ways and means by which such leases might have been previously granted. In the recent case of *Holden v. Weekes* the ancient authorities were reviewed, but no decided opinion was expressed by the court; Vice-Chancellor Wood was, however, rather in favour of such leases being granted with the consent of the proper parties. The result of these decisions and authorities would seem to be that the incumbent, *à fortiori*, the bishop or other superior corporation sole, with the proper consents, may grant leases to open new mines, and the author inclines to the opinion that the sanction of the Ecclesiastical Commissioners is only necessary to such leases when made in pursuance of the before-mentioned Acts of Victoria.

Subject to those Acts, and indeed in some instances, in pursuance of them, leases by corporations aggregate, such as those by the dean and chapter, may be granted without confirmation; but grants, whether leases or otherwise, by corporations sole, such as archbishops, bishops, deans, archdeacons, prebendaries, parsons, vicars, or perpetual curates, require confirmation by other persons, in order to render such leases binding on their successors (*c*); for instance, the lease of an archbishop or bishop generally requires the confirmation of the dean and chapter of the diocese (*d*); the lease of a dean, archdeacon, or prebendary, the confirmation of a bishop, as well as the dean and chapter; the lease of a parson or vicar, the confirmation of the bishop, as well as of the patron (*e*); and in the cases above referred to,

Consents  
to, and con-  
firmation  
of, leases.

(*c*) Co. Litt. 44<sup>a</sup>, 1 Burn's Ecclesiastical Law, 9th edit. pp. 298, 368; *Blewitt v. Tregonning*, 3 A. & Ell. 556.

(*d*) 2 Co. 39, 3 Co. 75; 10 Co. 60<sup>a</sup>.

(*e*) Co. Litt. 300<sup>b</sup>, 329<sup>a</sup>, 343<sup>b</sup>; Bacon's Abr. leases, G. 2; Watson's Clergyman Law, edit. 1747; *Jenkins v. Green*, 27 Beav. 487; *Duke of Marlborough v. St John*, 5 De G. & S. 179.



the consent also, it is presumed, of the Ecclesiastical Commissioners (*f*); the lease of a perpetual curate, where the curacy is augmented by Queen Anne's Bounty, now requires the confirmation of the patron paramount, as well as of the rector, or other immediate patron (*g*). If the parsonage or the vicarage was a donative, the confirmation of the patron alone was sufficient (*h*); or if the deanery was donative, that of the king alone was required (*i*). When the bishop was the patron, the confirmation of the dean and chapter, as well as that of the bishop, was necessary (*j*). The confirmation might be given at any time in the lifetime of the necessary parties, and either before or after the making of the lease, and it is said even after the death of the lessor (*k*). The consents thus required were, and still are, valuable check on improper alienations of church property.

## IRELAND.

By 11 Vic. c. 13, which amends the earlier Acts relating to Ireland, all ecclesiastical persons, aggregate and sole, and all other corporations, colleges, and hospitals, may demise mines and minerals for any term not exceeding forty-one years, and leases of existing mines and minerals may be surrendered.

## Leases.

By another Act, 23 & 24 Vic. c. 150, entitled, "An Act further to amend certain Acts relating to the temporalities of the Church in Ireland" (*l*), some special provisions are made in reference to leases of mines, minerals, and quarries. Section 14 enacts that whenever "application shall be made by a tenant holding any lands or premises by lease or contract from any archbishop, bishop, or other sole ecclesiastical corporation in Ireland, or from the said Ecclesiastical Commissioners, for the purchase of the fee-simple and inheritance of such lands or premises pursuant to the provisions of the Acts relating to the temporalities of the

Inquiries  
as to mines  
to be made.

(*f*) *Holden v. Weekes*, 30 L. J. Ch. 35.

(*g*) *Doe d. Richardson v. Thomas*, 9 A.d. & Ell. 556; *Mason v. Lambert*, 17 L.J. Q.B. 366; *Doe d. Brammall v. Collinge*, 7 C.B. 939; *Holden v. Weekes*, *suprà*.

(*h*) 1 Roll. Abr. 481, Dyer 273.

(*i*) *Watson's Clergyman Law*, 170, 171.

(*j*) Co. Litt. 300b; Moore 66.

(*k*) Co. Litt. 300b; *Newcomen's case* cited in 5 Rep. 15b; *Banister's case*, Cro. Car. 38.

(*l*) See also 3 & 4 Will. IV. c. 37.

Church in Ireland, or any of them, it shall be lawful for the said Ecclesiastical Commissioners, and they are hereby required, in addition to the several other matters which they are by the provisions of the Acts now in force authorized or required to ascertain previous to the conveyance of such fee-simple and inheritance, also to ascertain whether any mines or any quarries of marble or slate shall have been opened or discovered within or under the said lands or premises; and if any such mines or quarries shall have been opened or discovered, then to ascertain whether the same shall have been demised to any person or persons, or comprised in, or made the subject of, any contract for a lease or demise thereof." Section 15 enacts, "If it shall be ascertained that any such mines or quarries have been demised to any person or persons, or made the subject of any contract for a demise thereof, then it shall not be lawful for the said Ecclesiastical Commissioners to execute or affix their common seal to any conveyance of the fee-simple and inheritance of the lands or premises comprised in the application of such tenant as aforesaid, on, within, or under such mines or quarries as aforesaid shall have been opened or discovered, unless the said mines or quarries, together with all minerals, marbles, or slates, and all other issues, profits, and advantages to be derived therefrom, shall be first excepted out of the said conveyance, and the usual and necessary clauses inserted therein for securing to the archbishop, bishop, or other ecclesiastical corporation sole, or to the said Ecclesiastical Commissioners, as the case may be, and their respective agents, lessees, workmen, and all other persons to be appointed by them respectively, full powers to enter and work said mines or quarries, and take and carry away the produce and profits thereof." Section 16 enacts, "If in case of any application by any such tenant as aforesaid, it shall be ascertained, that no such mines or quarries shall have been opened or discovered within, on, or under any portion of the lands or premises comprised in such application, or that such mines or quarries shall have been opened or discovered, but that the same shall not have been

When to be  
excepted  
out of con-  
veyances.

Rents for  
mines pro-  
fitably  
worked.

demised to any person or persons, or made subject to any contract for a demise thereof, then it shall be lawful for the said Ecclesiastical Commissioners, save as hereinafter provided, to include such mines or quarries in the grant or conveyance of the said lands or premises." A rent in respect of mines or quarries to be at any future period opened or profitably worked, is reserved, payable to the Church authorities, in addition to the other rent reserved by the Act (sec. 17).

### ELEEMOSYNARY CORPORATIONS.

*Common Law right to work mines, and alienate lands. Statutory rights—13 Eliz. c. 10—14 Eliz. c. 14—18 Eliz. c. 6—39 Eliz. c. 5—6 & 7 Will. IV. c. 20—mining leases 16 & 17 Vic. c. 137—18 & 19 Vic. c. 124—25 & 26 Vic. c. 112. When a bequest of mining property to a charity is legal.*

Common  
law rights.

Statutory  
rights.

By the common law, all eleemosynary corporations had an absolute interest in all lands held in their corporate capacity, by virtue of which they might open mines, and alienate their possessions at pleasure; but several statutes have been passed, which have restrained improvident alienation, as well as afforded facilities for benefiting these institutions. By the 13 Eliz. c. 10 (*m*), as well as by 14 Eliz. c. 14, all eleemosynary corporations, such as colleges and hospitals, may grant leases for twenty-one years on three lives; and by the 18 Eliz. c. 6, provision is made for the reservation of a certain specified rent on leases to be granted by the public universities and colleges. By the 39 Eliz. c. 5, s. 2, made perpetual by 21 James I. c. 1, the power of leasing, granting, or conveying of lands belonging to hospitals and houses for the poor, was restrained; and all sub-leases, grants, conveyances, or estates so to be made or granted for more than twenty-one years, or unless the accustomed yearly rent be reserved, are declared void (*n*). The statute 6 & 7 Will. IV. c. 20, respecting the granting

(*m*) Ante, p. 237.

(*n*) Bishop of London *v.* Web. 1

P. Wms. 527; B. of Winchester's case, cited 2 Freem. 55.



of concurrent leases, and the renewal of old leases, applies to the master or guardians of hospitals. Concurrent leases.

By 16 & 17 Vic. c. 137, ss. 21-26, it is provided, that in case it appears to the trustees, or persons for the time being, acting in the administration or management of any charity; or the estates or property thereof, that any part of the charity, lands, or estates, may be beneficially leased for working any mine, or that the digging for, or raising of stones, clay, gravel, or other minerals, would be for the benefit of the charity, the trustees may lay before the Charity Commissioners a statement and proposal in relation thereto, and if such commissioners are satisfied that the leases proposed would be beneficial to the charity, they are empowered to make such order under seal for, or in relation to the granting of such leases, with or without such modification or alteration as they may think fit, although such leases may not be authorized or permitted by the trustees of the charity; and by section 26, such leases are to be as valid as if authorized by the terms of the trusts affecting the charity. The expressions "Charity," "Trustee," and "Land," are defined by the 66th section. Charity commissioners. Mining leases.

By the 18 & 19 Vic. c. 124, the acting trustees of every charity, or the majority of them, being not less than three, have conferred on them power to grant all such leases as the official trustee of charity lands appointed under the Act would have power to grant in the due administration of the charity. The two last-mentioned Acts are to be construed together as one Act (*o*).

Shares in a mining company bequeathed to charity commissioners or trustees of a charity are not within the statutes of mortmain, 9 Geo. II. c. 36, provided the interest of the shareholder so bequeathed was limited to the profits arising from the working of the mine (*p*); but if the shareholders have a direct interest in the land itself, then a bequest of any shares or interest therein will be obnoxious to the statute (*q*); thus a bequest to a charity, Subject to charity commissioners.

(*o*) Secs. 1, 16, 18; see also 25 & 26 Vic. c. 112.

(*q*) *Watson v. Spratley*, 10 Ex. 222, 245; *Hayter v. Tucker*, 4 K. &

(*p*) *Hayter v. Tucker*, 4 K. & J. 243; *J.* 250. *Hilton v. Giraud*, 16 L.J. Ch. 285.

of shares in the Rhymney Iron Company, which manufactured iron obtained from its own estates, was held void, because the bequest conferred an interest in the land, and the profits derived therefrom (*r*).

#### MUNICIPAL CORPORATIONS.

Common  
law and  
statutory  
rights.

IN general, at common law, all lay corporations had full power over lands of inheritance (*s*), and might work mines or grant their rights to strangers; but by 5 & 6 Will. IV. c. 76, ss. 94, 95 (*t*), municipal corporations are prohibited from selling or mortgaging (*u*) any lands or hereditaments, and in general also from demising for any term exceeding thirty-one years, except in pursuance of some agreement entered into before the 5th June, 1835, or with the approbation of any three of the Lords of the Treasury, and on such terms as they may think fit to approve; and under certain circumstances, renewal of leases may be made (*v*). Subject to the above restraints, municipal corporations retain their ancient rights; and whether they make an absolute or limited sale or grant, for other than mining purposes, the minerals under their lands should form a subject of consideration.

(*r*) *Morris v. Glynn*, 27 Beav. 218.  
(*s*) *Rex v. Watson*, 2 T.R. 199;  
*Mayor of Colchester v. Lowten*, 1 Ves.  
& B. 226.

(*t*) See also 2 & 3 Will. IV. c.  
69, sec. 3.

(*u*) 23 & 24 Vic. c. 16; *Payne v.*

*Mayor of Brecon*, 3 H. & N. 572;  
27 L.J. Ex. 495; *Pallister v. Mayor*  
*of Gravesend*, 25 L.J. Ch. 776; 2 Kay  
and J. 574.

(*v*) See also 6 & 7 Will. IV. c. 104.  
sec. 2; *Attorney-General v. Corpora-*  
*tion Great Yarmouth*, 21 Beav. 625.

## CHAPTER XIII.

## INJURIES TO MINING PROPERTY.

## WASTE.

## NUISANCE.

## WASTE.

*Definition of Waste—voluntary or permissive—destructive or meliorating—legal or equitable. Waste by persons with limited interests—Trustees—to whom profits of wrongful waste belong. Ecclesiastical persons—right to gravel, stone, &c., for repairs, but not for sale—continuing to work pits opened by Surveyors of Highways is waste. Remedies—legal and equitable. Injunctions—accounts. Proceedings against ecclesiastical persons.*

ANY spoil or destruction done or permitted to the inheritance, whereby the nature of the estate is changed, its value diminished, the burdens upon it increased, or the muniments of title impaired, is waste (*a*). If the above definition be correct, it follows that waste may be either voluntary or permissive, and in each case, either destructive or meliorating. Under some circumstances it is legal waste, in others equitable. Voluntary waste is where a person in possession commits an act *ultra vires*, as the opening of mines; permissive, is where property is injured by the omission of acts, which it was the duty of the party in pos-

Definition  
of waste.

(*a*) Co. Litt. 53b; 54; Bac. Abr. Waste, 279; 5 Rep. 12; Hob. 234; Doe d. Grubb v. E. of Burlington, 5 B. & Ad. 507; Doe d. Egremont v. Stephens, 6 Q.B. 223; Huntley v. Russell 13 Jur. 837; Coppinger v. Gubbins, 3 J. & La. T. 397; Doran v. Carroll, 11 Ir. Ch. 379, ante, pp. 153, 157-178.



session to have done, as in the case of working mines so near to the barrier as to cause the subsidence of the soil (*b*). Whenever any injury is done to the inheritance, it is destructive waste; or if the thing done only causes a change in the nature of the property, as by converting a furze-brake where game have bred, into arable or pasture, by which its real value would be improved, but its value to the landlord depreciated, that would be meliorating waste (*c*). Destructive waste will form the subject of inquiry at law or in equity, at the option of the injured party; but meliorating waste will almost invariably fall within the exclusive jurisdiction of the court of equity. If a tenant for life, having a right to explore the ground, be guilty of wanton or malicious disturbance of the soil, he will be guilty of equitable waste; on the other hand, if a tenant for life, having no right to explore the ground, do interfere with it, he is guilty of legal waste. What constitutes waste, is a question for the court; the amount of damages consequent upon waste, a question for the jury; but if a jury only award nominal damages, that is tantamount to giving a verdict for the defendant, as the law does not regard any act, by whomsoever committed, as amounting to waste, unless there be some substantial grievance or damage to the inheritance (*d*). Where waste has been committed, the wrongdoer must suffer from the impossibility of ascertaining accurately the amount of damage (*e*).

It is generally waste for all persons with limited interests to open new mines or quarries; but it is not waste for them to work old ones. These two questions have already been indirectly considered in all their bearings (*f*). When a legal estate is vested in trustees, upon trust for a tenant

Persons  
with li-  
mited in-  
terest.

Trustees.

(*b*) Co. Litt. 53<sup>a</sup>; *White v. M'Cann*, 1 Ir. C. L. 205; ante, pp. 159, 167.

(*c*) *Governors of Harrow School v. Alderton*, 2 Bos. & P. 88; *Doran v. Carroll*, 11 Ir. Ch. 379, ante, p. 159.

(*d*) *Doe d. Grubb v. Burlington*, 5 B. & Ad. 507; *Governors of Harrow School v. Alderton*, 2 Bos. & P. *suprà*; ante, pp. 159, 167.

(*e*) *Duke of Leeds v. Earl Amherst*, 20 Beav. 239.

(*f*) *Moyle v. Mayle*, Owen 66; *Briggs v. Lord Oxford*, 1 De G. M. & G. 363; *Lord Lovat v. D. of Leeds*, 2 D. & S. 75; *Bagot v. Bagot*, 32 L.J. Ch. 116; and cases cited, ante, pp. 153, 158, 161.

for life, with remainder over, it is their duty to protect the estate against waste (*g*), so that if a tenant for life, punishable for waste, or a stranger, should interfere with the surface, the trustees must prevent the waste, and if necessary seek the aid of a court of equity or law; but it does not seem that any right or duty attaches to their office for permissive waste only. Trustees themselves must not commit waste, as for instance, by cutting down trees (and inferentially, by searching for minerals), without the sanction of the Court of Chancery, or the consent of the persons interested, unless it was for the benefit of the estate and the *cestui que trusts* (*h*) that they should do so. Some of the authorities treat the profits of wrongful waste as belonging to the first owner of the inheritance, and others, as following the trusts of the settlement. In *Rolt v. Somerville* (*i*) and *Ormonde v. Kynerley* (*j*), which were cases for improperly cutting trees, it was held that the profits accruing from wrongful waste, belonged to him who had a vested inheritance in fee. In a case where timber was cut by trustees, with the consent of a tenant for life, impeachable for waste, it was held that the next tenant for life in possession was unimpeachable for waste, and that he was entitled to have the proceeds of the sale of timber paid over to him (*k*). In another case, where an estate stood limited to A for life without impeachment of waste, with remainder to his issue in tail, with similar remainder to B for life, with remainder to his issue in tail; A and B became bankrupt, and the assignees under their joint commission cut down ornamental timber; the produce was brought into court, and it was held that the assignees were entitled to no portion of the produce, but that the whole produce and accumulations belonged to the eldest son of B as first tenant in tail (*l*). The principle involved in these cases is applicable to minerals.

To whom  
profit of  
wrongful  
waste  
belongs.

(*g*) *Pugh v. Vaughan*, 12 Beav. 517; *Powys v. Blagrave*, Kay 495; 4 De G. M. G. 448; *Warren v. Rudall*, 29 L.J. Ch. 543; 1 J. & H. 1.

(*h*) *Campbell v. Allgood*, 17 Beav. 623.

(*i*) 2 Eq. ab. 759.

(*j*) 5 Mad. 369.

(*k*) *Waldo v. Waldo*, 10 L.J. Ch. 312; s.c. 12 Sim. 197.

(*l*) *Lushington v. Boldero*, 15 Beav. 1.

Ecclesiastical persons.

Ecclesiastical corporations sole are also liable for waste. It is waste for any of them to open new mines or quarries, but not to work old ones (*m*); a bishop will be restrained at the instance of the crown; a rector or vicar at the instance of the patron, or if he is a consenting party at the instance of the ordinary (*n*); but it does not appear that any other person could obtain a prohibition or an injunction restraining waste (*o*). The interests of these persons in Church property is peculiar, and in *Huntley v. Russell*, Mr. Justice Pattison said, "The incumbent of a rectory is not exactly in the position of a particular tenant, because there is no person who has the inheritance in reversion, but the fee simple of the glebe being in abeyance, the incumbent is, in truth, merely tenant for life, and he or his executors are no doubt liable for any waste committed (*p*).

Gravel stone, &c., for repairs.

A rector may cut down timber for the repair of the parsonage-house, but not for any common purpose, and this he may be justified in doing under the statute 35 Edward I. (stat. 2); and if it be the custom of the country he may cut down timber for any purpose, "but if he *grubs* it up it is waste (*q*); and a rector may take stone for necessary repairs, but if he dig up stone or gravel, even from pits which had been previously lawfully opened by surveyors of highways for repairs of the public roads, and disposes of them by sale, it will be waste."

Where, for instance, a gravel-pit in the soil of a rectory had been opened and kept open by orders of magistrates, under statute 13 Geo. III. c. 78, s. 29 and 5 & 6 Will. IV. c. 50, s. 54, for the repair of the highways (*r*), and the soil

(*m*) *Bunbury v. Hewson*, 3 Ex. 562; *Huntley v. Russell*, 13 Q.B. 572; ante, pp. 160, 246.

(*n*) *Holden v. Weekes*, 1 J. & H. 278.

(*o*) Temp. 35 Ed. I. 2 Roll. Abridg. 813; B. of Durham, 35 Ed. I. Rot. Parl. vol. i. p. 198; Cro. Car. 253; Year Book 2 Hen. IV.; *Jefferson v. B. of Durham*, 1 Bos. & Pull. 116, 130; *Stockman v. Whither*, B. of Salisbury's case, 1 Roll. 86; 2 Bulstr. 279; *Sakar's case*, 3 Bulstr. 91;

*Moor* 917; *Costerd's case*, 2 Roll. 111; *Knowle v. Harvey*, 1 Roll. 335; 3 Bulstr. 158; *Stampe v. Clinton*, 1 Roll. 95; *Liford's case*, 11 Co. 49; *Knight v. Mosely*, Amb. 176; *Wither v. D. & Chap. of Winchester*, 3 Mer. 421; *Duke of Marlborough v. St. John*, 5 De Gex & Sm. 174.

(*p*) 13 Q.B. 572; s.c. 18 L.J. Q.B. 239; 13 Jur. 837.

(*q*) *Strachy v. Francis*, 2 Atk. 217.

(*r*) *Huntley v. Russell*, 13 Q.B. 572, 579.



was not sloped down or filled up according to section 31 of the former Act, or section 55 of the latter, and some gravel had been taken from the pits, and sold by the rector's lessees, without sloping or filling up the cavities, it was held, in an action against the executors of the deceased rector, that the act complained of was waste. The learned judge, in summing up the case to the jury, observed that "if the surveyors of the highways got the gravel by the magistrates' orders, as to some extent they did, and if the surveyors of adjoining districts had the sanction of the magistrates for their getting the gravel, I cannot think it is waste in the rector; it is a proceeding in invitum, the Act of Parliament obliges him to let the surveyor take from the soil the material for the highways; and, if the surveyor had it in that way, it could not be waste, and he would incur no liability; it must have been on some other ground that the rector became liable, such, for instance, as receiving compensation from the surveyor of the highways for taking the gravel, on the supposition that he would restore the soil to its original state." In the ensuing term a rule nisi for a new trial, on the ground of misdirection, was obtained and afterwards made absolute, and Mr. Justice Patteson, in delivering the judgment of the court, is reported to have said:—"the defendants are certainly not liable for the original opening, or for the taking of such gravel as was used for the highways, unless they have shut themselves out from this defence by not pleading that matter specially, instead of merely pleading 'No Waste.' In order to show that they have so shut themselves out, the plaintiff relied on the case of *Simmons v. Norton* (s); that case is, however, distinguishable from the present; there the act done which constituted waste was the voluntary act of the defendant himself, and the defence attempted to be set up was a justification of the act, which was in itself *primâ facie* waste, under an alleged custom of the country. Here the defence is, that the act was done by others in the execution of a public duty, and was not *primâ facie* waste, which might, therefore, like the act of God, be given in evidence

Continuing  
to work  
pits opened  
by surveyors  
of highways.

(s) 7 Bing. 640.

on the issue of No Waste. But it was further contended by the plaintiff, that an omission on the part of the late incumbent to slope down the ground from which the gravel was taken, rendered the act of the surveyors waste done by him, and that, such omission being stated in the third count, the plaintiff was entitled to a verdict on the issue of 'No Waste,' and to damages to the extent of such sum as was necessary to slope down and put the ground into a state capable of cultivation; and those damages were assessed at £120; and accordingly the rule nisi is to enter a verdict for that amount. The statute 13 Geo. III. c. 78, s. 31, provides that the surveyors shall slope down the ground, and subjects them to penalties for not doing so, to be laid out in sloping down the ground; and no doubt the incumbent ought to have compelled them to do so; but we think it impossible to say that their omission, and his omission, in this respect, can have such retrospective effect as to render the taking of the gravel waste committed by him; and, of course, it cannot entitle the plaintiff to a verdict on the issue of 'No Waste.' We do not mean to hold out that any action could be maintained in any shape against the present defendants for this omission. Such omission would seem rather to be in the nature of misfeasance in the management and cultivation of the estate, for which this court has already held, in the case of *Bird v. Relph* (*t*), that an action will not lie against the executors of a deceased incumbent. It is, however, unnecessary to determine this point positively on the present occasion. It remains only to be considered whether a verdict ought to be entered for £5 on the second count, in respect of the value, found by the jury, of the gravel taken for other purposes than the highways; indeed, sold generally by the late incumbent. Now, if the gravel-pits in question had, before the incumbency of Mr. Grant, been opened and used for getting gravel for sale generally, we should incline to the opinion of Lord Hardwicke, in *Knight v. Mosely* (*u*), that Mr. Grant had not committed waste by continuing so to use them; but when it is found by the jury that the

(*t*) 4 B. & Ad. 826.

(*u*) *Ambler*, 176.

pits were opened by surveyors of the highways for public purposes, and the evidence shows that Mr. Grant's lessee dug gravel from them, and sold it generally for the first time, we think such digging and sale was equivalent to opening the pits for that purpose, and was an act of waste. The public necessity required the opening pits in the place in question; but the proper use of them was limited by that necessity. They ought also to have been sloped down after every exercise of the public right, and the incumbent, or his lessee, was not entitled to take advantage either of the opening which arose from that public necessity, or of the continuing open which arose from the omission of a public duty, and to say that the pits thereby became open for all purposes."

The remedies against waste are either by action on the case, which is in lieu of the old action of waste; or by bill in equity. After the action is brought, or the bill is filed, an injunction may be obtained, either at law or in equity, to restrain future waste (*v*); and, in cases of emergency, even before the bill is filed. If the proceedings are at law, substantial damages are recoverable; if in equity, an account is taken, and that of the produce only; but, since the Chancery Amendment Act, 1858, damages may now be recovered in equity as well as at law (*w*).

Remedies  
against  
waste.

When the severing of minerals amounts to waste, and the persons in reversion and remainder come into equity, to stay future waste, an account of past waste will also be decreed (*x*); and when the person suing has only an equitable interest in the severed minerals, he may have an account, wholly irrespective of his right to an injunction (*y*); the remainderman of an undivided share of the inheritance may have an injunction as well as an ac-

Injunctions  
and ac-  
counts.

(*v*) 3 & 4 Will. IV. c. 27, s. 26; 17 & 18 Vic. c. 125, secs. 79-81; *Redfern v. Smith*, 1 Bing. 382; *Bacon v. Smith*, 1 Q.B. 345; *Powys v. Blaggrave*, 4 De G. M. & G. 448; ante, pp. 159, 161.

(*w*) *Lee v. Alston*, 1 Bro. C. C. 194; 3 Bro. C. C. 37; *Powell v. Aiken*, 4 K. & J. 343; 21 & 22 Vic. c. 27, secs. 2-7.

(*x*) *Whitfield v. Bewitt*, 2 P. W. 240; *Jesus College v. Bloom*, Amb. 54; *Jesus College v. Bloom*, 3 Atk. 262; *Lee v. Alston*, 1 Bro. C. C. 194; 1 Ves. 78; *Parrot v. Palmer*, 3 M. & K. 632; *Richards v. Noble*, 3 Mer. 673; *Jefferys v. Smith*, 1 J. & W. 298.  
(*y*) *Lausdowne v. Lausdowne*, 1 Mad. 116; *Morris v. Morris*, 3 De G. & J. 323.



count (*z*); but where a tenant for life made a lease of coal mines of such a character as amounted to a forfeiture of his estate, it was held that he could not join with the remainderman in a bill to restrain the lessee from working the mines (*a*). The Statute of Limitations cannot be pleaded in bar to an action, or a suit, brought by a remainderman against a tenant for life for minerals severed more than six years before commencing proceedings, if the tenant for life has within six years rendered an account to the remainderman. An injunction, as well as an account, will be decreed for meliorating waste (*b*), not usually for permissive waste (*c*). No unnecessary delay in making an application to the court to restrain waste should be suffered (*d*); it is not even necessary to wait till some serious act of waste has been committed, provided there be reasonable ground for anticipating further waste. A threat, coupled with any act, however small in itself, will be presumptive proof of the intent (*e*).

Ecclesiastical persons.

The action of waste against ecclesiastical persons is called "an action for dilapidations," and it is maintainable by a successor against his predecessor or the executor of such predecessor (*f*). An account will not be decreed by a court of equity in reference to church property at the instance of the patron, as he must not derive any profit arising out of a wrongful act (*g*).

(*z*) Co. Litt. 53<sup>b</sup>.

(*a*) *Wentworth v. Turner*, 3 Ves. 3.

(*b*) *Brydges v. Kilburn*, 5 Ves. 689; *Smyth v. Carter*, 18 Beav. 78; *Doran v. Carroll*, 11 Jr. Ch. 379.

(*c*) *Powys v. Blgrave*, 4 D. M. & G. 448.

(*d*) *Attorney-General v. Eastlake*, 11 Hare, 228.

(*e*) *Coffin v. Coffin*, Jac. 71; *Barry v. Barry*, 1 J. & W. 651.

(*f*) *Wise v. Metcalfe*, 10 B. & C. 299; *Bird v. Relf*, 4 B. & Ad. 826; *Downes v. Craig*, 9 M. & W. 166; *Huntley v. Russell*, 13 Q.B. 572; *Bunbury v. Hewson*, 3 Ex. 562; *Bryan v. Clay*, 1 Ell. & Bl. 38.

(*g*) *Knight v. Moseley*, Amb. 176.

## NUISANCE.

*What constitutes a Nuisance — The cases relating to Brick-burning — Mining Furnaces — Noxious vapour — Necessity for Fences to Mines — Shafts and Machinery of a dangerous kind — Nuisances resulting from the pollution or detraction of Water — Removing of support to lands.*

THE law respecting nuisances is very closely connected with the law respecting waste. All injuries to the natural rights of property which do not positively interfere with the possession of the land, are nuisances. Those injuries may be direct or immediate on the one hand, and mediate or consequential on the other (*h*); in either case, the courts of equity, as well as of law, will afford redress. If a plaintiff applies for an injunction to restrain a nuisance, and the existence of the right or the fact of a violation be disputed, he must first establish his right and the violation of it, and then he will be entitled to an injunction to prevent a recurrence of the wrong (*i*); but if there is danger of irreparable mischief being done, before the right, or the violation of it, can be established, an interlocutory injunction will be granted *instanter* (*j*); and whenever a question of law arises on which the right of any party to any equitable relief depends, and whether the title to such relief be or be not incident to, or dependent upon a legal right, such question must now be determined by the Court of Chancery, and not sent to a court of common law (*k*). Injunctions being intended to prevent irreparable mischief, the court will not interfere in that mode, unless by so doing the enjoyment of the right can be secured (*l*), nor until it is clear that the act complained of must inevitably result in a nuisance (*m*).

What constitutes a nuisance.

(*h*) *Scott v. Shephard*, 1 Smith's leading cases, edit. 1856, vol. i. pp. 216, 346.

(*i*) *Broadbent v. Imperial Gas Co.* 7 Ho. Lords' Cases, 612; *Potts v. Levy*, 2 Dr. 272.

(*j*) *Earl of Ripon v. Robart*, 3 My. & K. 169.

(*k*) 25 & 26 Vic. c. 42. *Walter v.*

*Selfe*, 4 De G. & Sm. 315; on appeal, 19 L. T. 308; *Emnor v. Barwell*, 2 Giff. 410; on appeal, 4 L. T. N.S. 597.

(*l*) *Wood v. Sutcliffe*, 2 Sim. N.S. 163.

(*m*) *Haines v. Taylor*, 10 Beav. 75; *Elwell v. Crowther*, 6 L. T. N.S. 596.

Brick-burning.

The most familiar instances where the law of nuisance has been illustrated, will be found in that class of cases which refer to brick-burning (*n*), and on a reference to those cases, it will be seen that the law has not been satisfactorily or uniformly maintained. The difficulty, no doubt, is to reconcile the exigencies of business with the rights of the owners of the surrounding property, and recently the question has been found full of legal difficulties in its application to mines and manufactories. What, then, are the rights of the owners of property for injuries sustained by and through the smoke or sparks of furnaces and fires used in the processes of mines or manufactures? If, on the one hand, an individual has a legal right to object to any mining operations or manufacture being carried on within the area of its own works because smoke, or other noxious vapour, is discharged from them to the injury of his, the adjoining property, the result would be to stop a large number of the works in the kingdom; and if, on the other, an individual or a company have a right to purchase a piece of land, of small extent, and to mine or manufacture there as he pleases, the result would be that a greater amount of surrounding property might be sacrificed than the value of the works so carried on. The doctrine, "*sic utere tuo ut alienum non lædas*," must, therefore, be brought to bear upon the subject; but this begs the whole question, and resolves itself into a consideration of the respective rights of adjoining owners. The rights of each are equal, and this almost involuntarily leads to the opinion, that nothing more than a reasonable use of land can be allowed, if an unreasonable use of it injure the adjoining territory. What is a reasonable use of land has recently been raised in the case of a smelting company; but the case has not yet found its way into the reports. Another species of nuisance relates to the duty of mine owners to

Mine furnaces.

Noxious vapour.

Fences.

(*n*) Pollock *v.* Lester, 11 Hare, 266; Duke of Grafton *v.* Hilliard, 4 De G. & Sn. 326; Attorney-General *v.* Cleaver, 18 Ves. 219; Walter *v.* Selfe, 4 De G. & S. 324; Hole *v.* Barlow, 4 C.B. N.S. 334; Bamford

*v.* Turnley, 2 Fos. & Fin. 231; Cleeve *v.* Mahany, 9 W. R. 882; Cavey *v.* Ledbitter, 3 Fos. & Fin. 14; Beardmore *v.* Tredwell, 31 L.J. Ch. 892; Steven *v.* Child,



provide suitable fences to all excavations, or dangerous machinery made or erected on mines and mining works. In the case of *Hounsell v. Smyth* (o), the declaration alleged that the defendants were seized in fee of waste land, and that before the grievance alleged, a quarry had been opened on the land, which was worked by leave of the defendants, who received a royalty; that the waste was open to the public, and that all persons having occasion to cross it had been wont to cross it with the license of the owners; that the quarry was situate near to and between two public highways leading over the waste, and was dangerous to persons who might accidentally deviate, or have occasion to cross the waste for the purpose of crossing from one road to the other; that the defendants, well knowing the premises, left the quarries unfenced, and the plaintiff having occasion at night to cross the waste to get from one of the roads into the other, and not being aware of the existence of the quarry, fell into it and was injured. Mr. Justice Williams, in delivering judgment said, "The law as to this has long been settled by *Blyth v. Topham* (p), and confirmed by subsequent cases. *Blyth v. Topham* is an authority for the proposition, that if the owner of waste land dig a pit in the waste within a certain distance of the highway, he is not responsible for injury sustained by cattle that stray from the highway on to the waste and fall into the pit; and the authority of that case is confirmed by the distinction drawn in *Barnes v. Ward* (q), and pointed out by the court in *Hardcastle v. the South Yorkshire Railway Company* (r). It is true that the general doctrine as to the non-liability of owners of land to fence excavations in their own land, was qualified to this extent by *Barnes v. Ward*, that the excavation must not be made so near to a road as to amount to a public nuisance; and that if it be, and a private injury result, it is actionable; on the well-established principle, that a private injury re-

Fences to  
mines,  
shafts, and  
machinery

(o) *Hounsell v. Smyth*, 29 L.J. C.P. 203; 7 C.B. N.S. 731; 6 Jur. N.S. 195.

897.

(p) *Cro. Jac.* 158.

(q) 9 C.B. 392, s.c. 19 L.J. C.P.

(r) 4 H. & N. 67; s.c. 28 L.J. Exch. 139.

ences to  
mines,  
shafts, and  
machinery.

sulting from a public nuisance is the subject matter of an action for damages. In this case the allegation amounts to nothing more than that the quarry was somewhere between the two roads; not so near as to amount to a public nuisance, but so near that persons deviating from the one for the purpose of crossing to the other might fall into it. It has been long established, as I have already observed, that those facts give no cause of action unless the excavation is so near the road as to amount to a public nuisance. That limitation is founded on reason and good sense; for if the public have acquired a right of passing along a road, they cannot be deprived of that right, as they would substantially be by the owner of the adjacent land digging a precipice on each side, and so making it dangerous to use it. If he does that, he clearly commits a public nuisance; but it is not alleged that the defendants here have done anything amounting to a public nuisance. This case has been likened to the case of *Corby v. Hill* (s); but there is no analogy between them. In *Corby v. Hill*, the defendant held out an inducement to persons to come upon his land, by allowing the road to be used, and held out as a means of access to his house; and he gave them no previous knowledge or intimation that they would encounter any peril or difficulty in so using the road. The principle upon which that case was decided approaches very nearly to the principle explained in *Barnes v. Ward*, for the defendant was held liable for having put an obstruction in a road by which the plaintiff, who was invited, and had so far a right to use the road, was injured. The plaintiff, in the present case, had merely permission to cross the waste, and might have known of the existence of the quarry, and of the danger he incurred by crossing the waste. The case is not in principle distinguishable from *Blyth v. Topham*, and does not fall within the exception established by *Barnes v. Ward*, in which there was a public nuisance and a private injury resulted, and therefore it was held that an action

(s) 4 C.B. N.S. 556; s.c. 27 L.J. C.P. 318.

was maintainable by the party injured. For these reasons I am of opinion that the defendants are entitled to our judgment."

Where a canal had been made in land along which lay **Fences,** an ancient footway, and between the canal and footway was a towing-path nine feet wide, and a strip of grass several feet in breadth, and the public were permitted to pass over the whole intervening space which was left unguarded and unlighted, it was held by the Court of Queen's Bench that the canal was not so near to or adjoining the footway as to be a nuisance, or to impose on the proprietors the duty to fence, light, or protect it. And, *per curiam*, "We adopt on this subject the law as laid down in *Hounsell v. Smyth* (*t*), that to throw upon the owner the obligation of fencing an excavation on land adjoining a public road or way, it ought to be shown that the excavation is so near thereto as to be dangerous to persons using the road in the line of the road" (*u*).

Where a right to work mines or quarries has been granted by the owner of the soil, whose duty it is, in the absence of agreement or custom, to provide fences,—the owner of the soil, or the grantee or licensee?—is a case which does not seem to have been decided until the recent case of *Williams v. Groucott* (*v*). The plaintiff was the owner of a certain field near Holywell, in Flintshire, and the defendant, who was engaged in mining operations in Wales, was the owner of the minerals under the field in question, having a right to sink shafts for the purpose of working the minerals. On the 23rd of October, 1861, the plaintiff turned some horses of his into the field,<sup>2</sup> and the shaft sunk by the defendant not being fenced, a mare belonging to him fell down the shaft and was killed. An action to recover £50, the alleged value of the mare, was brought in the Flintshire County Court, and was tried in the month of December, 1862, before the deputy-judge of that court,

When the rights to minerals and the soil are distinct.

(*t*) 7 C.B. N.S. 731.

(*v*) 32 L.J. Q.B. 237.

(*u*) *Binks v. South Y. & R. D. Navigation Co.* 32 L.J. Q.B. 26.



Fences to  
mines,  
shafts, and  
machinery.

when a verdict was returned by the jury for the plaintiff, with damages £40, subject to a special case stated by the deputy-judge for the decision of the Court of Queen's Bench. The question came on for argument in Trinity Term, 1863. On behalf of the defendant it was contended that the plaintiff, having licensed the sinking of the shaft, was bound to protect himself from any dangerous consequences that might arise to his cattle; and that the defendant, having done nothing more than he had a clear right to do, was not liable to fence the shaft so as to protect the plaintiff, the surface owner. There was no evidence of any particular custom as to fencing pits and shafts amongst the miners of Wales. For the plaintiff, it was urged that the owner or occupier of minerals having easements on the surface, is bound to adopt the necessary precautions to protect the surface owner. The Lord Chief Justice admitted that the question was a nice one, and that there was no direct authority upon the point. "The question," said his Lordship, "was whether, where the ownership of the minerals below the surface is separated from the ownership of the surface, with license to sink a shaft, it is incumbent on the licensee to protect the owner of the soil; or whether it rests with the owner of the surface to protect himself. Here there is no express stipulation between the parties, and no evidence of any particular custom of the country. The owner of the surface may say, 'You have liberty to sink the shaft, but you must protect me.' On the other hand, the licensee may say, 'You have given me leave to sink the shaft, and although this may be dangerous, still I have done no more than you gave me license to do, therefore you must protect yourself.' This then is the question, and in the absence of any express authority we can only look to what is reasonable, and we are disposed to think and to act upon the opinion, that it is but reasonable that the licensee having the use of the shaft should protect the owner of the surface, and that therefore the verdict of the plaintiff should stand." Justices Wightman and Blackburn concurred.

Whenever water is polluted or diverted, the injuries <sup>Water.</sup> resulting therefrom frequently terminate in a nuisance; and if the natural support to land is withdrawn, that also <sup>Support to land.</sup> frequently becomes a nuisance. These two questions are fully discussed in another chapter following Servitudes and Easements, by reference to which it will be seen when such injuries to real property become nuisances in the technical sense of the word.

It is further to be observed, as a general rule, that a <sup>Abatement of nuisance.</sup> person who is injured by a nuisance may abate it, provided he can do so without committing a breach of the peace, or endangering human life (*w*).

(*w*) *Perry v. Fitzhowe*, 8 Q.B. 776, and authorities there cited.

## CHAPTER XIV.

## TITLE BY ALIENATION.

1. ALIENATION IN GENERAL
2. LEASES
3. LICENSES
4. SALE OF MINE SHARES
5. MACHINERY
6. TITLE BY WILL

## ALIENATION GENERALLY

*Statute of Frauds, and 8 & 9 Vic. c. 106. Deeds generally—Feoffment, Grant, Partition, Exchange, Lease, Surrender by Operation of Law. The doctrine of caveat emptor applied to Mines—How affected by deceit either on the part of the Vendor or Purchaser. Specific performance and Equitable relief—Rights beneath the surface, on severance of two Estates. Mines sold by the Court of Chancery. Registration of Deeds—Stamps. Who may alienate—The Crown—The Duchy of Cornwall—The Freeholder—The Lord of the Manor—Persons with limited interests—Trustees—Mortgagees—Assignees of Bankrupts—Official Liquidators—Ecclesiastical and Municipal Corporations.*

*SALES AND LEASES OF SETTLED ESTATES. Mining Leases by direction of Court of Chancery. On Sales, Minerals may be reserved—19 & 20 Vic. c. 120; 22 & 23 Vic. c. 35; 23 & 24 Vic. c. 145; 25 & 26 Vic. c. 108—Confirmation of doubtful powers for leasing, and sale of Minerals—How proceeds of sales to be applied.*

Statute of  
frauds.

A DEED is generally necessary to the creation or transfer of any legal estate in minerals unsevered from the soil (a). By the Statute of Frauds, 29 Charles II. c. 3, it is enacted, that “all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, and out of any

(a) *Hewlins v. Shippam*, 5 B. & C. W. 838; *Perry v. Fitzhowe*, 8 Q.B. 221; *Wallis v. Harrison*, 5 M. & W. 757; *Roffey v. Henderson*, 17 Q.B. 142; *Wood v. Leadbitter*, 13 M. & 587.



messuage, manors, lands, tenements, and hereditaments, made and created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either at law or in equity, be deemed or taken to have any or other greater force or effect, any consideration for making such parol leases to the contrary notwithstanding;" except, nevertheless, as appears by the 2nd section, "all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount to two-third parts at least of the full improved value of the thing demised."

The third section enacts that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interests in any messuages, lands, manors, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

The 4th section enacts that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within one year, unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be lawfully charged therewith, or some other person thereunto by him lawfully authorized (*b*).

The 1st section (*c*) seems to be co-extensive with the 4th, and consequently every interest which is within the 4th section is equally within the 1st, unless it come within

(*b*) *Botting v. Martin*, 1 Camp. 317; *Carrington v. Roots*, 2 M. & W. 257; *Mollett v. Brayne*, 2 Camp. 103; *Toppin v. Lomas*, 16 C.B. 145; *Snelling v. Lord Huntingfield*, 1 C. M. & Thomas v. Cooke, 2 Stark. 408; *R. 20*.  
*Thomson v. Wilson*, 2 Stark. 379; (*c*) *Cooch v. Goodman*, 2 Q.B. 596.  
*Phipps v. Sculthorpe*, 1 B. & Ald. 50;

Statute of  
frauds.

the saving of the 2nd section. The 1st and 2nd sections amount to this, that all interests actually created without writing shall be void, unless in the case of a lease not exceeding three years, at nearly rack-rent. If an estate, of whatever value, should be conveyed to a purchaser by livery of seisin, without writing, the Act would avoid the estate, although the purchaser had paid his money. An actual lease for any given number of years, whether with or without rent, or any lease uncertain in point of duration, must, it should seem, equally fall within the provision of the 1st section, and cannot be sustained unless it come within the saving in the 2nd section (*d*). This, however, of itself would not have prevented all the evils which the Act intended to avoid, for although actual estates could not be created, yet still parol agreements might have been entered into respecting the future creation of them. To remedy this mischief, the provision in the 4th section was inserted, which relates, not to contracts or sales of or concerning land, but to any *agreement* made upon any such contract or sale: and as agreements were more to be dreaded than contracts actually executed, no exception was inserted in the 4th section similar to that which followed the first section, and consequently an agreement by parol, to create even such an interest as is excepted in the 2nd section, would be merely void (*e*). The 4th section does not exclude unwritten proof in the case of executed contracts; so that if one party has performed the contract, and the other has accepted such performance, the objection that the agreement was not in writing cannot be supported (*f*).

8 & 9 Vic.  
c. 106.

The 8 & 9 Vic. c. 106, after repealing the 7 & 8 Vic. c. 76, provides that after the first day of October, 1845, all corporeal tenements and hereditaments, as regards the conveyance of the immediate freehold, are to be deemed to lie in grant as well as in livery; and that a feoffment,

(*d*) Crosby v. Wadsworth, 6 Ea. 610; Lord Bolton v. Tomlin, 5 Ad. & El. 857.

(*e*) Lord St. Leonard's Vendors & Purchasers, edit. 1862, p. 123.

(*f*) Lavery v. Turley, 6 H. & N. 239.

“other than a feoffment made under a custom by an infant, shall be void in law, unless evidenced by deed; and that a partition, and an exchange, of any tenements or hereditaments, not being copyhold, and a lease, required by law to be in writing, of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the said first day of October, 1845, shall also be void at law, unless made by deed; provided always, that the said enactment so far as the same relates to a release or a surrender shall not extend to Ireland.” The Act does not in any respect apply to Scotland (*g*).

Previous to the 8 & 9 Vic. c. 106 an assignment or surrender need not have been by deed (*h*); and now, notwithstanding the said statute, there may still be an assignment or surrender of any lease by operation of law. In *Fulmerstone v. Steward* (*i*) it was held that if he who is possessed of a term of years takes a new lease of the same premises, to commence presently, the arrangement would amount to a surrender of the first lease. In *Thomas v. Cook* (*j*) there was an agreement, which was not in writing, between the landlord, his tenant, and an incoming tenant, to accept the latter as the tenant of the premises, and it was held that this was a surrender by operation of law; and it was similarly held in *Grimman v. Legge* (*k*), where the possession was delivered by the tenant and accepted by the landlord. And in *Dodd v. Acklom* (*l*) a similar doctrine was maintained; and it was also decided in that case that one of two joint lessees, who had solely interfered and acted as the ostensible lessee, could surrender both on behalf of

Surrenders  
by opera-  
tion of law.

(*g*) See 1, 2, 3, 10; *Arden v. Sullivan*, 14 Q.B. 832; *Doe d. Davenish v. Moffatt*, 15 Q.B. 257; *Tress v. Savage*, 4 Ell. & B. 36; *Stratton v. Pettit*, 16 C.B. 420; *Drury v. Macnamara*, 5 Ell. & B. 612; *Golden v. Taylor*, 2 F. & F. 110; *Rollason v.*

*Leon*, 7 H. & N. 73; *Bond v. Rosling*, 1 Best & S. 371.

(*h*) *Farmer v. Rogers*, 2 Wils. 26.

(*i*) *Plowd.* 106.

(*j*) 2 B. & Ald. 119.

(*k*) 8 B. & C. 324.

(*l*) 13 L.J. C.P. 11.



himself and his co-lessee. The above cases must be distinguished from those like *Doe d. Huddleston v. Johnston* (*m*), where there was a mere agreement without change of possession, and *Mollett v. Brayne* (*n*), where the landlord replied that he would hold the former tenant to the payment of his rent (*o*).

Caveat  
emtor  
applied to  
mines.

In applying the rule of *caveat emptor* to iron or coal and other mines, it must be remembered that every one acquainted with that kind of property is aware that such mines are liable to be interrupted by faults. On this subject Vice-Chancellor Wood is reported to have said (*p*), "With regard to mines, the rule of *caveat emptor* must be put rather higher than the plaintiff has here contended for. It has been said, how can a man know what coal there is underground? But every man who has anything to do with mining knows that coal-mines are liable to faults (*q*). If it had turned out that, in the course of working, the plaintiff had come across ancient mines, excavated by the Romans, or others in former times, and found that there the vein of coal was wholly exhausted, what might, in such case, have been the result may be a question; but every one who takes a lease of coal-mines, though he does so with the firm belief that the veins of coal go on underneath the land, yet knows that they may possibly be interrupted. Treat the case as if it were a sale of a mine which proved afterwards to be full of faults; of course the purchase would be made for the purpose of working. The coal is not worked out; but nature has done what the purchaser knew beforehand it often does, namely, caused an interruption of the vein of coal. That is one of the incidents which must be calculated upon in buying mining property, and therefore cannot be a reason for avoiding the purchase." The same doctrine was maintained in *Haywood v. Cope*, and in that case the opinion of Lord St. Leonards on this subject is quoted, and some of the autho-

(*m*) *McClell v. Yon*, 141.

(*n*) 2 Campb. 103.

(*o*) Per Tindal C. J. in *Dodd v. Acklom*, 18 L.J. C.P. 11.

(*p*) *Ridgway v. Sneyd*, Kay, 635.

(*q*) The coal mines of the Forest of Dean are not so, see manuscript Rep. of Lord Seymour v. Morrell, 1851.

rities reviewed; the same case decides that taking possession of a mine is not necessarily an acceptance of the title (*r*).

Nevertheless, a vendor must not make any false representations respecting the property, otherwise the purchaser will be released in equity, even after the conveyance is executed (*s*); on the other hand, a purchaser of land is not bound to disclose to the vendor the fact of there being underneath the surface minerals or veins of minerals, although he knows the vendor is ignorant of it, but he must not mislead the vendor (*t*). What amounts to misrepresentation, either on the part of the vendor or the purchaser, is a question which the Court of Chancery will inquire into with some care. There can be no misrepresentation if the party alleging it was from the beginning cognizant of the real state of the thing complained of; and where a mine had been formerly worked at a loss and abandoned, and a person twenty years afterwards desiring to take a lease of it, inspected it, and then contracted for a lease, without having been informed by the owner or knowing the fact that the owner had himself worked the mine and found it unprofitable, he was held to be bound by the contract, although the mine proved worthless (*u*). If after a knowledge that he has been deceived, the purchaser continues to deal with the property, or to enjoy it, as, for instance, by the working of the mines (*v*), he cannot object to the title; and any delay, after such knowledge in applying to the court is fatal (*w*); but if the mines are carried on by arrangement, there will be no waiver of objections (*x*).

The Court of Chancery will decree specific performance of an agreement for the purchase of any interest in a mine, Specific performance.

(*r*) 25 Beav. 140, 142, 153.

(*s*) *Edwards v. McLeay*, Coop. Ch. C. 308; *Small v. Attwood*, You. 407, 503; s.c. 6 Cl. & Fin. 232; *Jennings v. Broughton*, 5 De G. M. & G. 126; 23 L.J. Ch. 999.

(*t*) *Fox v. Mackreth*, 2 Bro. C.C. 420; *Turner v. Harvey*, Jac. 178; *Deane v. Rastron*, 1 Anst. 64; *Brealey Collins*, You. 317.

(*u*) *Haywood v. Cope*, 25 Beav. 140.

(*v*) *Vigers v. Pike*, 8 Cl. & Fin. 562; s.c. 2 Dr. & Wal. 1.

(*w*) *Small v. Attwood*, You. 503; *Haywood v. Cope*, *suprà*; *Eads v. Williams*, 24 L.J. Ch. 531.

(*x*) *Stevens v. Guppy*, 3 Russ. 124.

Specific performance and equitable relief.

and for carrying into effect any other agreement which can be fairly executed; as well as give relief against an arbitrary exercise of powers reserved to a grantor; but no specific performance will be decreed of any contract which is ambiguous in its terms (*y*), or where the subject-matter has undergone such an alteration that it cannot be given to the claimant if a decree were made (*z*); nor for carrying into effect contracts of persons with limited interests to the prejudice of those in remainder or reversion. The remedy in such cases will be at law to recover damages (*a*). If an expenditure has been incurred under a verbal promise to renew a lease, specific performance will be decreed (*b*); but where a lessee has a right to a renewal under a covenant, the court, before decreeing, a performance will inquire into the conduct of the lessees, to see if they have fairly carried out the obligations imposed upon them by their own covenants in the original lease (*c*), and where a renewal is agreed to, whether under a covenant or by subsequent agreement, the terms of the old lease in the absence of any other arrangement will be declared to be terms of the new lease (*d*). But the court will not, in a suit for specific performance, direct inquiries or accounts to be taken of the defendant's management, for the purpose of ascertaining whether any compensation should be made by the defendant to the plaintiff (*e*). Where a bill was filed for specific performance, and the defendant was in possession and working the mines under a contract which provided for payment of the purchase-money by monthly instalments, the court made an order for payment of the first instalment after it became due (*f*). Where coal under twelve acres of land was sold, to be paid for at a certain fixed sum per acre, specific performance

(*y*) *Meynell v. Surtees*, 25 L.J. C.C. 140; *Richardson v. Sydenham*, Ch. 257. 2 Vern. 447; *Pilling v. Armitage*, 12 Ves. 78.

(*z*) *Flint v. Brandon*, 8 Ves. 159; (*c*) *Walker v. Jeffreys*, 1 Hare, 341. *Carne v. Mitchell*, 15 L.J. Ch. 287; (*d*) *Ricketts v. Bell*, 1 De G. & S. *Nelson v. Bridges*, 2 Beav. 239. 335.

(*a*) *Jones v. Reynolds*, 4 Ad. & Ell. 335. (*e*) *Jefferys v. Smith*, 3 Russ. 158. 805; *Price v. Griffith*, 1 De G. M. & Stevens v. Guppy, 3 Russ. 184. G. 80; *Booth v. Pollard*, 4 Yo. & C. 61. (*f*) *Buck v. Lodge*, 18 Ves. 450.

(*b*) *Robertson v. St. John*, 2 Br.



was decreed, and a clause directed to be inserted, enabling the grantor to inspect the mines at all reasonable times, to ascertain the quantity of ground worked (*g*). Specific performance of a contract for the purchase of an estate in which there is a reservation of mines, will be decreed where there is a great improbability of the mines being worked, or the purchaser being disturbed in his possession of the estate; for instance, where in a grant by the crown there was a reservation of mines, without a right of entry, and there had been no search for mines for one hundred and eleven years, and upon examination, the probability was great that there were no such mines, and the crown for want of a right of entry, could not grant a license to any person to enter and work them, Lord Hardwicke decreed a specific performance; and a purchaser of an estate with some valuable mines, which were under a common, was compelled to complete the purchase, as an obstruction from the commoners was highly improbable (*h*).

Specific performance and equitable relief.

But where in a conveyance of 1794, a reservation was made of salt-works, with a right of entry and an admission that there were mines, the title was not deemed good, although on a sale in 1761, no notice was taken of the reservation, and the mines had never been worked; eventually the purchaser accepted the title with a compensation (*i*). So where the workings under an agreement had ceased, and the pits had been filled in, but the right to work them was held not to have ceased, the purchaser's claim to a compensation was established (*j*).

If specific performance of a contract will afford no adequate compensation to a purchaser, he will be entitled to recover the value of the property at the time of the contract being entered into (*k*). An agreement to lease two seams of coal, "known as the two-feet coal and the three-feet coal, lying under land to be hereafter defined in the Bank-

(*g*) *Blakesly v. Wieldon*, 11 L.J. Ch. 166; s.c. 1 Hare, 176.

(*h*) *Lyddal v. Weston*, 2 Atk. 19; *Seaman v. Vawdry*, 16 Ves. 390; *Stewart v. Conyngnam*, 1 Ir. Ch. R. 584; *Havens v. Middleton*, 10 Ha. 641.

(*i*) *Seaman v. Vawdry*, *suprà*; *Martin v. Cotter*, 3 Jo. & La. T. 496.

(*j*) *Ramsden v. Hurst*, 27 L.J. Ch. 482.

(*k*) *Brown v. Thorpe*, 11 L.J. Ch. 78.

Specific  
perform-  
ance.

End estate," is not so indefinite as to prevent its being enforced, and specific performance will accordingly be decreed (*l*). In a suit by a vendor against a purchaser for specific performance, the court will not, as a rule, upon an introductory application, direct an inquiry as to the title; therefore, in a suit instituted for the specific performance of a contract for the purchase of certain mines in Brazil, an introductory application for an inquiry, whether the plaintiff could make a good title to the property without prejudice to any question in the cause, was refused (*m*). The plaintiff, by letter, offered to work the ironstone lying under the lands of the defendant and to pay a fixed rent and a royalty; the land-steward, by letter, accepted the offer, and agreed to grant a lease for twenty-one years, if, after a year's trial, it was asked for; the plaintiff applied for the lease, but he refused to give any security that the undertaking would be carried out and the covenants in the lease observed, or to join any responsible person with him in the undertaking; the land-steward, accordingly, declined to proceed with the lease, or to assign the area over which the ironstone was to be worked. Upon a bill for the specific performance of the agreement, it was held, that the agreement was indefinite; that the land-steward in the absence of assurance that the undertaking would be carried out and the covenants in the lease observed, was not bound to assign the area for the mineral workings; and the bill was accordingly dismissed, but, under the circumstances, without costs (*n*).

Rights be-  
neath the  
surface on  
severance  
of two  
estates.

By permission of the tenant for life of farms A & B, the defendant, many years ago, made a culvert from a brook, which, in its natural course, flowed to farm A, for the purpose of getting water for his own premises and for farm B; the culvert, which carried off nearly all the water from the brook, commenced in some lands of the defendant which were bounded by the brook, and then passed through farm B, where a portion of the water was drawn out of it,

(*l*) Haywood v. Cope, 27 L.J. Ch. 468.

(*n*) Lancaster v. De Trafford, 31 L.J. Ch. 554.

(*m*) Reed v. the Don Pedro Mining Co. 32 L.J. Ch. 773.

by means of a small pipe, for the use of farm B; the rest of the water, namely, the larger portion, flowed on down the culvert, which, after traversing farm B ended in other premises of the defendant where the water was consumed; in September, 1856, the then owner of farms A & B, conveyed farm B in fee to the defendant, together with all waters and water-courses appertaining to the premises, or used, occupied, or enjoyed with the same; he afterwards conveyed farm A to the plaintiff, with all waters and water-courses; and it was held, that, as against the owner of farm A, the words of the conveyance of farm B were sufficient to convey to the defendant the right to the continuance of the culvert, and to the accustomed flow of water down it; and that his right was not limited to the taking so much of the water as had heretofore been used for the purposes of farm B. Mr. Justice Williams said, "There has been a variety of decisions upon a class of cases analogous to that now in question, viz. rights of way. The decisions as to rights of way have established that, after the easement has been extinguished by unity of ownership, the right of way cannot pass as appurtenant to the premises to which it was formerly attached, though it continues to exist in point of user. Yet, though it does not exist as a right, it will pass in a conveyance of the premises, if there be proper words used to pass it: as if you convey all ways 'used and enjoyed' with the land. The first question for us is, whether the words in the conveyance are sufficient to pass the right? If this be answered affirmatively, the second question is, what is the extent of the right passed? Now, applying the principles above laid down to the present case, it appears to us that the right to the water-course passed by the deed of September, 1856" (o).

The general rule, that a purchaser of an estate sold under a decree in Chancery is entitled to be let into possession from the quarter-day preceding his purchase, is not applicable to mines; and on the sale of a colliery the purchaser was declared to be entitled to the profits from the com-

Mines sold  
by the  
Court of  
Chancery.

(o) *Barlow v. Rhodes*, 1 Cr. & M. 439; *James v. Plant*, 4 A. & E. 749; 146. *Wardle v. Brocklehurst*, 29 L.J. Q.B.



mencement of the month in which he purchased and paid the purchase-money; the completion of the purchase dates from the confirmation of the master's report (*p*). When a sale is directed by the Court of Chancery, the practice of the court in directing the opening of biddings is not applicable to mines (*q*).

Registra-  
tion of  
deeds.

Deeds relating to any interest in land in the county of Middlesex (7 Anne, c. 20; 25 Geo. II. c. 4), or within the East (*r*), West (*s*), and North (*t*) Ridings of the county of York, must be registered; but the registry of deeds relating to land in the West Riding of Yorkshire is optional at the election of either party, but if not registered, such deeds are void as against any subsequent purchaser or mortgagee for valuable consideration. The above Acts do not apply to copyholds or to mining leases not exceeding twenty-one years, or to any assignment thereof, but they are extended to mortgages (*u*), and to leases under powers or by appointment (*v*). A registry of a subsequent deed in which a previously unregistered deed is recited, will not cure the defect of want of registry of the first deed (*w*). All deeds relating to lands being part of 95,000 acres in the Bedford Level, are also to be registered (*x*). The registration of leases in Ireland is regulated by 6 Anne, c. 2. Stamps of deeds are now chiefly regulated by the 13 & 14 Vic. c. 97; 17 & 18 Vic. c. 83; & 23 & 24 Vic. c. 15.

Stamps.

Who may  
aliene.

The right to alienate minerals must necessarily depend upon the nature and extent of the interest, which is vested in the person proposing to make the conveyance.

The Crown.

The king, by the common law, could make absolute grants of the royal demesnes, but this power of alienation was restrained by Act of Parliament, which prevents any

(*p*) *Marfell v. Rudge*, 2 You. & C. 566; *Wren v. Kirton*, 8 Ves. 502; *Williams v. Attenborough*, 1 Turn. & Russ. 70; *Twigg v. Fifield*, 13 Ves. 517; *Garrick v. Earl Camden*, 2 Cox, Ch. C. 231.

(*q*) *Williams v. Attenborough*, *supra*.

(*r*) 6 Anne, c. 35.

(*s*) 2 & 3 Anne, c. 4; 5 Anne, c. 18.

(*t*) 8 Geo. II. c. 6.

(*u*) *Fury v. Smith*, 1 Huds. & Bro. 735.

(*v*) *Scrafton v. Quincey*, 2 Ves. Sr. 413.

(*w*) *Honeycomb v. Waldron*, 2 Str. 1064; *Jack v. Armstrong*, 1 Huds. & Bro. 727.

(*x*) 15 Car. II. c. 17, s. 8.

grant in general being made of the lands of the crown for a term exceeding thirty-one years (*y*); but the crown may nevertheless restore lands which have accrued to the sovereign by escheat, or forfeiture (*z*). Whenever the crown makes a grant of any interest in minerals, the same must be by "matter of record," usually by charter or letters patent (*a*), and as disputes may, and not unfrequently do, arise between the crown and the subject, as in a recent case respecting a grant of coal mines purporting to have been made by the crown, the grantee should not be satisfied with a less carefully prepared instrument from the crown than from a private person. In the case referred to, the crown, by letters patent, as lord of the manor of E, made a grant of "all those coal mines found, or to be found, within the commons, waste grounds, or marshes within the said lordship of E," with a proviso that the grant should be construed strictly against the crown, and most strictly and beneficially for the grantees; this grant was held to pass coal lying under the foreshore of the estuary of the river Dee, between high and low water marks, and forming part of the manor of E, and the information by the Attorney-General was dismissed with costs (*b*).

The possessions of the Duchy of Cornwall were, at common law, inalienable; but we have already referred to numerous Acts of Parliament, under and by virtue of which very extensive powers of alienation have been conferred upon His Royal Highness the Duke for the time being; or in case of no Duke, the Crown (*c*).

Duchy of  
Cornwall.

The owner of an estate in fee simple, where the ownership in minerals is blended with, or not distinct from, the ownership in the soil, may convey an absolute right to minerals with liberty to work them, or grant any lesser estate than his own; a similar right is vested, but with some qualifications, in tenants-in-tail, tenants-in-tail after possibility of issue extinct, tenants for life dispossessed

Free-  
holder.

(*y*) 1 Anne, Stat. 1, c. 7; 34 Geo. III. c. 75; 48 Geo. III. c. 73.

(*z*) 39 & 40 Geo. III. c. 88, s. 12; 47 Geo. III. sess. 2, c. 24; 59 Geo. III. c. 94; 6 Geo. IV. c. 17.

(*a*) 14 & 15 Vic. c. 82.

(*b*) Att.-Genl. v. Hanmer, 27 L.J. Ch. 837.

(*c*) Ante, p. 180.

able of waste (*d*), and joint-tenants (*e*); but where the ownership in minerals is distinct from the ownership in the soil, as in copyhold lands (*f*), no alienation of them, except by custom, will enable the alienee to disturb the surface, as that would amount to waste (*g*); but in commons and waste lands, where the rights of the lord and the commoner are also distinct, the lord may by deed authorize a disturbance of the surface, if sufficient herbage is left for the use of the commoners (*h*).

Lord of the manor.

Persons with limited interests.

Tenants for life impeachable for waste, tenants, by the curtesy, or in right of dower (*i*), infants, married women, idiots, and persons of unsound mind (*j*), were all disabled at common law from making any grant of minerals; but now, by several statutes, numerous provisions have been made for enabling persons with limited interests or whilst labouring under disabilities, to make limited grants and leases of their estates, and with the approbation of the Court of Chancery, to make absolute sales and otherwise to deal with their property. Assignees of bankrupts, and official liquidators have also special powers for alienating property which may involuntarily become vested in them by virtue of their respective offices (*k*); and trustees, mortgagees, and others, who have no express power given to them for the purpose by deed, may make conveyances, leases or grants of necessity, and by recent Acts of Parliament, in some cases, absolute, in others partial, disposal of the estates vested in them (*l*). The rights of, and powers of alienation of ecclesiastical and municipal corporations, and trustees of charities have been already noticed (*m*).

SALES AND LEASES OF SETTLED ESTATES.

The most important of all the recent Acts which have been passed for enabling persons with limited interests, trustees, mortgagees, and persons under disabilities, to make grants of their minerals estates, is the 19 & 20 Vic. c. 120, entitled "An Act to facilitate Leases and Sales of Settled Estates," whereby any person entitled to the

(*d*) Ante, pp. 157-163.

(*e*) Ante, p. 169.

(*f*) Ante, p. 171.

(*g*) Ante, p. 172.

(*h*) Ante, pp. 188, 193.

(*i*) Ante, pp. 159-163; post, p. 283.

(*j*) Ante, p. 217, post, p. 283.

(*k*) Ante, p. 222, post, p. 283.

(*l*) Ante, p. 229, post, p. 283.

(*m*) Ante, p. 234.



possession or receipt of the rents and profits of any settled estates for life, or for a term of years determinable on his life, or for any greater estate either in his own right or in right of his wife, unless the settlement expressly prohibits any such demise, and any person entitled to the possession, or to the receipt of the rents and profits of any unsettled estates, as tenants by the curtesy, or in dower, or in right of a wife who is seized in fee, may, without any application to the court, demise the same, or any part thereof, except the principal mansion-house and the demesnes thereof, for any term not exceeding twenty-one years to take effect in possession; provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved without any fine or other benefit in the nature of a fine, such rent to be incident to the immediate reversion; and provided that such demise be not made *without impeachment of waste*, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment for a period not less than twenty-eight days, of the rent thereby reserved, and on non-observance of any of the covenants or conditions therein contained; and provided a counterpart of every deed of lease be executed by the lessee (*n*). And the Courts of Chancery in England and Ireland have also power (*o*), having due regard to the interests of all parties entitled under the settlement, to authorize leases, and a surrender or renewal of such leases of the whole or any part of any settled estates, or of any rights or privileges over or affecting any settled estates for any purpose whatsoever, whether *involving waste or not*, provided the following conditions be observed:

“Firstly, that every *mining* lease shall be made to take effect in possession at or within one year from the making thereof, and shall be granted for a term not exceeding forty years; a similar provision is therein contained respecting

Leases of settled estates.

Mining leases by direction of the court.

(*n*) Secs. 32, 33, 35. See also 21 & 22 Vic. c. 77; re Chambers, 28 Beav. 653; White v. Leeson, 5 Jur. N.S. 1361. (*o*) Secs. 2-6, 10; re Burdin's Will, 5 Jur. N.S. 1378.

Mining  
leases by  
direction of  
the court.

leases of water, water-mills, way-leaves, water-leaves, and other rights or easements, and for the construction of roads and water-courses. Secondly, on every such lease shall be reserved the best rent, or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener, without taking any fine or other benefit in the nature of a fine. Thirdly, where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned; namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate, or by virtue of any declaration in the settlement, is entitled to work such earth, coal, stone, or mineral for his own benefit, one fourth part of such rent, and otherwise three fourth parts thereof; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent, by the appointment of trustees or otherwise, as the court shall deem expedient. Fourthly, no such lease shall authorize the felling of any trees except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorized by the lease. Fifthly, every such lease shall be by deed, and the lessee shall execute a counterpart thereof; and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of not less than twenty-eight days after it becomes due. Subject and in addition to the conditions herein-before mentioned, every such lease shall contain such covenants, conditions, and stipulations as the court shall deem expedient with reference to the special circumstances of the demise" (*p*).

Leases may  
contain  
special  
covenants.

Sales by  
direction of  
the court.

And the court may also direct sales of the whole or of any part of the settled estates, where limited interests are reserved, and, upon any such sale, any earth, coal, stone, or other *minerals* may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants, or submit to any restrictions,

which the court may deem advisable (*q*). The term "settlement" (*r*), is defined to include any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument whereby any estates or interests in any hereditaments of any tenure, shall stand limited to, or in trust for, any person by way of succession; and "settled estates" is to signify all hereditaments of all tenures, and all estates and interests therein which are the subject of a settlement. There are no leases to be granted of any copyhold or customary hereditaments not warranted by the customs of the manor, without the consent of the lord, nor to the prejudice of the rights of the lord of the manor (*s*).

The powers given by the Act, and the application to the court, extend to and include estates belonging to tenants for life, notwithstanding incumbrances (*t*), tenants-in-tail after possibility of issue extinct (*u*), trustees (*v*), infants, married women, lunatics, and assignees of bankrupts or insolvents, but not to official liquidators, unless by implication (*w*); and in reference to the estates of married women, it is provided that no clause or provision in any settlement restraining anticipation by them shall prevent the court from exercising the power given by the Act, even although the married woman may be under age (*x*). The Act applies to all settlements of lands in England and Ireland (whether made before or after it shall come in force, except those as to demises to be made without application to the court, which shall extend only to settlements made after the Act shall come in force) (*y*), but not to Scotland (*z*); and nothing in the Act is to create any obligation, at law or in equity, on any person to make or consent to any application to the court, or to exercise any power given by a settlement (*a*), or to authorize any sale or lease beyond the term of twenty-one years of any settled estates in which, under the Act of the 34 & 35 Henry VIII. c. 20 (to embar feigned recovery of lands wherein

To whom  
the Act  
applies.

(*q*) Secs. 11, 13, 15, 31.

(*r*) Sec. 1.

(*s*) Sec. 43.

(*t*) Sec. 41.

(*u*) Sec. 1.

(*v*) Secs. 10, 17, et seq.

(*w*) Sec. 36.

(*x*) Secs. 37-39, re Forster's Settlement, 3 Jur. N.S. 833; re Breal's Est.; re Manson, 24 Beav. 220, 221.

(*y*) Sec. 44.

(*z*) Sec. 45.

(*a*) Sec. 40.



the king is in reversion), or under any other Act of Parliament, tenants in tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the crown (*b*).

Before the Settled Estates Act, it was first decided that under a general power of sale or of leasing, the estate could not be sold or leased separately from the timber (*c*), and afterwards the principle of that decision was extended to minerals (*d*); but under the provisions of the Settled Estates, and subsequent, Acts, minerals may, under the direction of the Court of Chancery, be leased or sold separately from the land (*e*).

A purchaser may object that what is proposed to be done is not within the jurisdiction of the court (*f*), and the court has no power to do more than the settler himself could have done, and is precluded from exercising the powers of the Act if the settlement contains an express declaration or a manifestation of intention that they should not be exercised (*g*).

23 & 24  
Vic. c. 145.

The 23 & 24 Vic. c. 145 goes a step further, but it does not operate retrospectively, nor against the express declaration of the parties (*h*). It actually provides powers, to be exercised under settlements and wills, and gives powers of sale to mortgagees who have no such power given to them by the persons creating the charge upon their estates. The Act extends to exchanges, where exchanges are authorized by the powers of sale, and it contains a provision for renewing renewable leaseholds.

25 & 26  
Vic. c. 108.

By the 25 & 26 Vic. c. 108 (after reciting that trustees and others, in the intended exercise of trusts or powers authorizing them to dispose of land by sale, exchange, partition, or enfranchisement, have disposed of land subject to such trusts or powers, with an exception or reservation of minerals, and either with or without rights and powers for

(*b*) Sec. 42; re Thompson's Est. John. 419.

(*c*) Cholmeley v. Paxton, 3 Bing. 207; 5 Bing. 48.

(*d*) Buckley v. Howell, 30 L.J. Ch. 528.

(*e*) 22 & 23 Vic. c. 35, s. 13; 25 & 26 Vic. c. 108, *infra*; Mallin's Settled Est. 3 Giff. 126.

(*f*) Re Thompson Est. John. 418.

(*g*) Re Thompson Est. *supra*.

(*h*) Secs. 32, 34.

or incidental to the working, getting, and carrying away of such minerals, or otherwise relating thereto, or had so disposed of minerals with or without such rights and powers separately from the residue of the land, such mode of disposition not being expressly authorized nor forbidden by the instrument creating the trust or power: and that it was expedient to confirm such dispositions as aforesaid:—it is enacted that “No sale, exchange, partition, or enfranchisement at any time heretofore of land by any trustee or other person expressed or intended to be made in exercise of any trust or power authorizing the sale, exchange, partition, or enfranchisement of land, and not forbidding the reservation of minerals, and which sale, exchange, partition, or enfranchisement, shall have been made with an exception or reservation of minerals, and with or without rights or powers for or incidental to the working, getting, and carrying away of such minerals, or otherwise relating thereto, shall be invalid on the ground only that the trust or power did not expressly authorize such exception or reservation, but such sale, exchange, partition, or enfranchisement shall be deemed to have taken effect in the same manner as if the exception or reservation had been authorized by the trust or power; and no sale, exchange, or partition heretofore made as aforesaid of any minerals separately from the residue of the land subject to the trust or power intended to have been exercised, and either with or without such rights or powers as aforesaid, shall be invalid on the ground only that the trust or power did not expressly authorize such sale, exchange, or partition, but such sale, exchange, or partition shall be deemed to have taken effect in the same manner as if such minerals, rights, and powers (if any) had been expressly authorized to be so dealt with separately from the residue of such land; but this enactment shall not be deemed to confirm any sale, exchange, partition, or enfranchisement already declared by a court of competent jurisdiction to be invalid, nor to confirm or affect any sale, exchange, partition, or enfranchisement as to the validity of which any suit or other proceeding is now pending.”

Confirmation of doubtful powers for leasing and sale of minerals.

Trustees  
may dis-  
pose of  
land or mi-  
nerals se-  
parately.

“Every trustee or other person now or hereafter to become authorized to dispose of land by way of sale, exchange, partition, or enfranchisement, may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals, or may (unless forbidden as aforesaid) dispose of by way of sale, exchange, or partition the minerals with or without such rights or powers separately from the residue of the land, and in either case without prejudice to any future exercise of the authority with respect to the excepted minerals, or (as the case may be) the undisposed-of land; but this enactment shall not enable any such disposition as aforesaid without the previous sanction of the Court of Chancery, to be obtained on petition in a summary way of the trustee or other person authorized as aforesaid, which sanction once obtained shall extend to the enabling from time to time of any disposition within this enactment of any part or parts of the land comprised in the order to be made on such petition, without the necessity of any further or other application to the court.” This Act does not extend to Ireland or Scotland.

Under the 25 & 26 Vic. c. 108. s. 2, the court, before making an order for the sale of lands, with an exception or reservation of the minerals and the right and powers of or incidental to the working, getting, or carrying away of such minerals, will require the consent and appearance of the persons beneficially interested in the property (*i*).

How pro-  
ceeds to be  
applied.

By 6 & 7 Vic. c. 94, the purchase-money of lands taken from persons not the absolute owners was required to be paid into court, but where a tenant for life had expended money in erecting a steam-engine on the land so taken he was allowed by the Court of Chancery to return the compensation money, on the understanding that the erection was of a permanent nature (*j*), and the same course

(*i*) Re William Brown, 1 N.R. 13; (*j*) Re Duke of Wellington, Settled Re Willway's Trust, 32 L.J. Ch. Est. 30 L.J. Ch. 187.  
226.



would, it is submitted, be pursued by the court under the Settled Estates and other Acts hereinbefore referred to. By 10 & 11 Vic. c. 96 trustees may pay monies realized from the sale of minerals into the Court of Chancery, and other provisions are made in reference thereto by the 12 & 13 Vic. c. 74; 13 & 14 Vic. c. 60; 18 & 19 Vic. c. 91, s. 10; and by 20 & 21 Vic. c. 64, provision is made in cases of fraudulent conversion of monies by trustees.

## SECTION II.

### LEASES.

**LEASES GENERALLY.** *A Demise of minerals is a demise of the realty—when a demise of lands includes Mines and not Quarries—effect of a demise of coal after a demise of other minerals in the same land—under what circumstances Equity will grant relief. A Lease is Partnership assets. Right of a Lessee to inspect an adjoining mine. When recitals amount to covenants—description of the premises—Habendum—Reddendum in different districts—Covenants—form and construction of covenants—oppressive covenants—to raise a certain specified quantity—sales at the pit's mouth—covenants running with the land—for yielding up in repair machinery and fixtures—when an excess of produce of one quarter may be set off against a deficiency of another quarter—covenant of an assignee—waste—implied covenant to make pits—equitable assignee—bankruptcy—when a covenant to refer to arbitration is void—to yield up in repair—quiet enjoyment. Covenants, when joint and several.*

**LEASES UNDER POWERS.** *When Mines opened or unopened are included in a power to lease—construction of powers generally—meaning of the word “rent.” Equitable jurisdiction. 12 & 13 Vic. c. 26; 13 Vic. c. 17. Leases on lives—in possession or reversion. 23 & 24 Vic. c. 145; 25 & 26 Vic. c. 108.*

A DEMISE of minerals unsevered from the soil is a What  
demise of the realty (*k*), and vests, unlike a mere license, mines are  
the absolute possession of the subject matter demised in the included in  
the lessee, without entry; and a demise “of lands,” or “of a demise of  
lands and mines,” includes mines then opened, or, if there land.  
were none opened, unopened mines (*l*). Sir Edward

(*k*) Schellinger v. Blackerby, 1 Ves. Sr. 346; Stoughton v. Leigh, 1 Taunton, 405; Dickin v. Hamer, 29 L.J. Ch. 778;

(*l*) Astry v. Ballard, 2 Lev. 185; Holden v. Weekes, 30 L.J. Ch. 35; Lord Darcy v. Askwith, Hob. 234; Spencer v. Seurr, 31 L.J. Ch. 808. Whitfield v. Bewit, 2 P. Wms. 242;

Coke states the law thus: "If a man hath land in which there is a mine of *coales*, or of the like, and maketh a lease of the land (without mentioning any mines) for life or for *yeares*, the lessee for such mines as were open at the time of the lease made may *digge* and take the profits thereof; but he cannot *digge* for any new mine, that was not open at the time of the lease made, for that should be adjudged waste; and if there be open mines, and the owner make a lease of the land, and the mines therein, this shall extend to the open mines *onely*, and not to any hidden mine: but if there be no open mine, and the lease is made of the land together with all mines therein, there the lessee may *digge* for mines, and enjoy the benefit thereof, otherwise those words should be void. I have been the more spacious concerning this learning of waste, for that it is most necessary to be *knowne* of all men" (*m*). And a demise of two seams of coal and all other seams under an estate includes the unworked seams (*n*); but if open limestone quarries are on land demised, the lessee or tenant may work them for estrovers only, but not for sale, the analogy to open mines not holding in such a case (*o*); and where a lease for lives contained the following exception, "excepting and reserving unto the said lessor all mines, minerals, and other royalties whatsoever, with liberty to search for, dig, raise, manufacture on the premises, and carry away the same," it was held not to include open limestone which a former lessee had been in the habit of working (*p*).

Quarries.

Effect of a demise of coal, after a demise of alum.

Subsequently to a lease for taking alum from coal works another lease of the coal mines was granted, subject, however, to the rights of the lessees of the alum; afterwards it was found impracticable to work the coal without removing the pillars which supported the roof, whilst the removal of the pillars would have rendered the alum in the wastes inaccessible; and upon these facts it was held that the prior grant of the alum to the lessees must remain

(*m*) Co. Litt. 54<sup>b</sup>.

(*n*) Spencer v. Scurr, 31 L.J. Ch. 808.

(*o*) Mansfield v. Crawford, 9 Ir.

Eq. 271; Purcell v. Nash, 1 Jones (Ir.) 625.

(*p*) Brown v. Chadwick, 7 Ir. C.L. Rep. 101.

intact, and consequently that the pillars could not be removed (*q*).

A demise of coal mines for thirty years, to be worked upon a payment of a fixed sum of money, cannot be set aside because the coal cannot be worked at a profit; but if extraordinary difficulty or expense would be likely to be incurred in carrying on the mine, the court will grant relief (*r*). A lease of a coal mine was granted for twenty-one years, the only rent reserved being dependent upon the quantity of ore raised, and the court held that the lessee was bound by the terms of the lease to commence working immediately, and to proceed continuously (*s*). A lease required for and dedicated to the purposes of a partnership, whether granted in the name of one or all of the partners, forms part of the partnership assets (*t*). Relief in equity.

A leaseholder of a mine will, on motion, be allowed to inspect an adjoining mine, to ascertain that his own interest in his own mine is kept intact, provided such inspection can be accomplished without injury to the person whose land is sought to be inspected. On this question the Master of the Rolls has said (*u*): "The principle upon which the court acts in cases like the present is, that if a person has an interest in the value of the property of another, especially if it is to support a legal interest, he is entitled to inspect that property, to ascertain that its value is not depreciated. It is established, by the *East India Company v. Kynaston* (*v*), that if a defendant is making use of his property to injure the property of the plaintiff, the plaintiff is at liberty to inspect the adjoining property, to see whether injury is done; and the court only requires a *prima facie* case to enable it to make an order. The contradiction of the defendant amounts to nothing, unless it can be shown that a positive injury is sustained by him Right of inspecting adjoining mines.

(*q*) *Earl Glasgow v. Hurlet* Cy. 3 Ho. of Lords' Cases, 25.

(*r*) *Jervis v. Tomkinson*, 1 H. & N. 195; *Griffiths v. Rigby*, 1 H. & N. 237.

(*s*) *Sharp v. Wright*, 28 Beav. 150.

(*t*) *Burdon v. Barkus*, 31 L.J. Ch. 521.

(*u*) *Bennill v. Whitehouse*, 29 L.J. Ch. 328.

(*v*) 3 *Swanst.* 248; s.c. 3 *Bligh*, O.S. 153.



Right to  
inspect ad-  
joining  
mine.

by being compelled to grant the inspection. By a *prima facie* case, I mean there must be evidence to show that in the absence of any contradiction to it, there would be reasonable ground for supposing that a trespass was committed. That exists in this case. The court will balance the testimony, and require the best evidence to ascertain whether a trespass has been committed; and if it were not for that, either perjury or an unconscious mistake on the part of the defendant would prevent the plaintiff from acquiring that which is his right. Suppose a man has a right to the surface of the ground, but no right to the minerals, and the person who has a right to the minerals says, 'You are sinking a shaft, and getting the minerals under the land which belongs to me, and with which you have nothing to do, and you will not allow me to go into your land to see whether that is done,'—would not this court allow him to go on the land, to see whether he is sinking a shaft for that purpose? I acted upon that principle in *Adshead v. Needham*. In that case there was a pit, and I allowed the parties to go through an underground gallery to see whether they were uniting a 'loose' to the pit, going up the 'loose' which let out the water. In the *East India Company v. Kynaston*, Lord Redesdale, alluding to *Lord Lonsdale v. Curwen* (*w*), says, 'The order was made before the decree, in a question where the rights of the parties were uncertain. It might be that Lord Lonsdale had no right at all; it might have turned out, after the order of inspection had been made in *Lonsdale v. Curwen*, that the plaintiff had no right; but, in this case, the right is ascertained; the only difference, which is immaterial, is, that in *Lord Lonsdale v. Curwen* it was a mine, and in the *East India Company v. Kynaston* it was a warehouse; but both are equally private property. In the first case the result of the inspection was, the discovery that coal to the amount of £3000 had been taken from Lord Lonsdale.' So, wherever it happens that a person has the power of making use of his land to the injury of another, and there is *prima facie* evidence of his doing it,

(*w*) 3 Bligh, O.S. 168.

even though contradicted, and the real fact can only be ascertained by going upon that land for the purpose of inspecting it, and that inspection can be done without producing injury to the person whose land it is, I am of opinion that this court will allow a direct inspection. That inspection must, of course, take place at the plaintiff's expense, after giving reasonable notice and reasonable time, so as not to inconvenience the defendant; subject to that he is entitled to an inspection of the mine leading to the plaintiff's land; the plaintiff, therefore, must be at liberty, on giving one clear day's notice, to go down the mine, and, without doing any injury to the mine, to inspect the workings, by himself and his agents, for the purpose, so far as may be necessary, of ascertaining whether he is working into the plaintiff's land, with liberty to use the defendant's machinery for descending and ascending, with liberty also of measuring, latching, and dialling the mine, and of making plans of the workings of the defendant's mine."

The recitals of a lease are often inserted without a due regard to their importance, and a lessee not unfrequently finds himself placed under obligations in consequence of their insertion, which he neither contemplated nor bargained for. In a case where a lease of an undivided third part of certain mines, contained a recital of an agreement made by the lessee with the lessor and the owners of the other two thirds, for pulling down an old smelting mill and building another of larger dimensions, and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it; it was held, that such a recital amounted to a covenant to build the new mill (*x*). But some nicety is necessary in the construction of recitals lest it lead to the doctrine that something more is to be implied from them than was really expressed, and Lord Denman (*y*), in com-

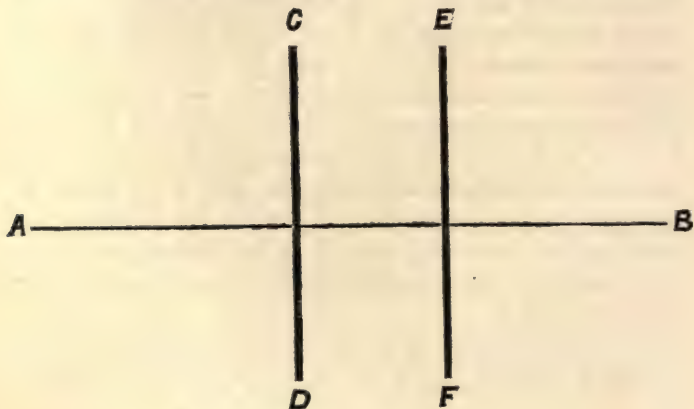
When recitals amount to covenants.

(*x*) *Sampson v. Easterby*, 9 B. & C. 506; s.c. 1 Crompt. & J. 105; see also *Keppell v. Bailey*, 2 Myl. & K. 517. (*y*) *Aspdin v. Austin*, 5 Q.B. 683, see also *James v. Cochrane*, 7 Ex. 173; 8 Ex. 556; & post, pp. 297, 301.

menting upon the above-mentioned case of *Sampson v. Easterby*, is reported to have said, "Where words of recital or reference manifested a clear intention that the parties should do certain acts, the courts have from these inferred a covenant to do such acts, and sustained actions of covenant for the non-performance, as if the instruments had contained express covenants to perform them." But it is a manifest extension of that principle to hold that, where parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of their express covenants; and where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.

Boundaries  
and de-  
scription of  
premises.

Too much minuteness cannot be observed in the description and boundaries of the demised premises, and especially in the coal districts where the course of veins may be interrupted by the intersection of cross veins. For instance, suppose, as in the figure below, you were entitled to the vein A B, and that another person was entitled to a cross vein, as C D, and, to make it more complicated, that a third person was entitled to another cross vein, as E F; in such





cases it is often difficult to trace the veins of C D and E F on both sides of the vein A B, and as these cross veins do in some instances so nearly correspond that the one vein may be mistaken for the other, it is evident that the description and boundaries should be carefully defined; and in order to guard against any difficulty in ascertaining the rights of A B, C D, and E F respectively, insert a provision when feasible, for referring all disputes which may arise during the working of the veins to some disinterested person, otherwise endless litigation may ensue. The demise should also contain provision in reference to rights of way, and in the coal districts for way-leaves, both to enable the lessor to retain the benefit of those ways subject to the grant made by him, as well as for the benefit of the grantees (z). The lessor should also reserve a right to inspect the mines and the workings thereof, and this is none the less necessary because such a power of inspection may be established by custom (a).

A lessor demised for sixty years certain cottages and an engine-house, and all the mines which then were or thereafter during the term might be discovered within all the lands, about five hundred and fourteen acres, described in a map; and also liberty for the lessees to dig and carry, and sell all iron and coal, in, from, over, upon, or under the lands, and to open and dig any pits or levels into, upon, about, or under the mines and lands, except in or upon the demesne lands coloured red in the plan (being a piece of four acres), on which a capital mansion-house and buildings were erected; and it was held, that this was a demise of the whole mines under the whole five hundred and fourteen acres, but with a restricted right of enjoyment in the lessees, in the lands coloured red; so that the demise neither included the mines under the red part, nor a right to the lessees to work them (b).

A mining lease is usually granted for seven, fourteen, or *Habendum.* twenty-one years, but it may be granted for any other

(z) *Ricketts v. Bell*, 1 De Gex & Sm. 335.

(a) See ante, 6; *Blakesly v. Wiel-*  
*don*, 11 L.J. Ch. 166.

(b) *Dugdale v. Robertson*, 3 Jur. N.S. 687.

term consistent with the interest of the lessor; when granted for any term not exceeding twenty-one years, where there is occupation under it, such a lease is not to be affected by the "Declaration of Title Act, 1862" (c).

Redden-  
dum.

The rents or renders under the lease may be reserved either in *specie* or in *kind*, or in both; if in *specie*, that is to say, in money, the usual incidents of an ordinary reservation of rent will follow; but if in *kind*, that is to say, in the produce or commodity itself in its natural state, this will rather be an exception of a part of the land itself, than a rent; but if the reservation is a portion of the produce in a smelted or manufactured state, then it will constitute a rent (d). Where the render is in *specie*, the time runs from the last receipt of the produce, and not from the time of converting it (e). A certain sum stipulated to be paid by instalments is not a rent (f). In the coal districts

In different  
districts.

of the North of England the rent is reserved upon one or other of the following principles: 1, upon the tonnage; 2, upon the amount of sales; 3, per acre of coal, one foot thick and so in proportion; 4, a certain sum independently of the quantity of the coal raised, but this last species of rent is nearly obsolete because wanting in equity (g). In other coal districts a proportionate part of the net produce realized upon the sale of the coal is frequently the only rent reserved. Special renders are made for outstroke rights, way-leaves, and for other privileges. In the Forest of Dean, the reservation is a fixed sum per ton, with a minimum or dead rent in case the coal or iron raised should not amount to a certain quantity (h). In the West of England, in the copper and tin districts, the reservation is usually of a certain fixed portion of the net produce of the ores, and recently it has been not unfrequently the practice to reserve a rent, payable in money, for the full term of the lease, whether the mine is worked or not; this

(c) 25 & 26 Vic. c. 67, s. 29.

(d) Co. Litt. 47<sup>a</sup>, 142<sup>a</sup>.

(e) *Denys v. Shuckburgh*, 4 You.  
& Col. 42.

(f) *Hatherton v. Bradbourne*, 13  
Sim. 599; 13 L.J. Ch. 171.

(g) See *Treatise on Working of Collieries*, by Matthias Dunn (Newcastle, 1848).

(h) Post, title "Gloucestershire."

minimum or dead rent for these districts is very objectionable, and as the lessees or their assignees are alone responsible to the landlord under the covenants, it behoves those who enter into such engagements to remember the responsibility they incur in case the mine should prove profitless, or by any means is not carried on during the full period of the term. Throughout Scotland, and many other districts, it is customary to apportion the rent according to the amount of the value of the coal sold, and this rent varies from 1-5th to 1-15th, depending on the value of the coal and the cost of producing it. In some cases a colliery is re-let which is already "won" and in course of working, whereas another is to "win" at great risk and capital; such rents, therefore, are generally payable from the value of the coal at the pit-top; so that the expense of delivering them at the *depôt* or place of shipment is deducted from the value at such distant place before estimating the rent. This is a very fair principle of proportioning rent; but where the coals are conveyed to distant markets by the proprietors, and the sale is devious, it becomes difficult to apportion the value (*i*).

In the absence of express grant, the *l  see* of a mine is entitled to work the minerals by instroke (*j*); and where the lessee of a mine, A, took a lease of an adjoining mine, B, from which he was entitled to get the coal from B mine at a certain rent, with liberty to bring the coal gotten from the A mine to the surface by way of "outstroke" through the B mine, on payment of a fixed charge per ton for outstrokes, water-course-rent, and shaft-rent,—no rent to be paid for any coal to be gotten from B mine which should be used or consumed on or for any engine employed for working or carrying on such mine;—it was held, that no rent was payable for coal used for working the engine of the B mine when employed in bringing up the coal from the A mine, such engine being at the same time used for keeping the B mine free from water (*k*). On a demise of land for

(*i*) See Dennis, p. 55.

(*k*) *Senhouse v. Harris*, 5 L.T.

(*j*) *Whalley v. Ramage*, 10 W.R. N.S. 635.



a term of years, with power to the lessee to dig brick earth, and make and sell bricks, paying yearly £17 10s. for the surface rent, and £100 for royalty, or brick rent, clear of all deductions except landlord's property or income-tax, and also paying 2s. in respect of every 1000 bricks above the first million, clear of all deductions except as aforesaid, it was held, that under the 5 & 6 Vic. c. 35, income-tax was payable by the lessor in respect of all three species of rent, and was properly assessable on the lessee, who might deduct the amount from the rent (*l*).

**Covenants.** The covenants of a lease are the most important part of the instrument, and must depend in some measure upon the nature of the minerals to be worked, but the following summary will serve as a guide in all cases (*m*). The covenants on the part of the lessee should provide especially: for the payment of the stipulated rent and renders, and the rates and taxes; for making compensation for all damage done to the surface or to adjoining proprietors; for ascertaining the quantity of coal or other minerals raised; for working the mines in a proper manner; for the erection of machinery and buildings of a certain defined power, and in some cases residences for the workmen; in the coal districts, for leaving barriers as a mutual protection between adjoining owners and securing from injury the levels and passages, as well as for working adjoining properties by outstroke; for keeping proper accounts and delivering copies thereof to the lessor, or allowing the originals to be inspected by the lessor and copies thereof to be taken by him; for keeping plans of the workings; for inspection of the mines and works by the lessor; against assigning or underletting without leave of the lessor; and for giving up possession of the mines in good condition, with proper passages to the coal or other mineral, at the end or other sooner determination of the lease. There should also be inserted suitable provisions for properly fencing in (*n*) and securing all pits which have been or should thereafter

(*l*) *Edmonds v. Eastwood*, 27 L.J. Ex. 209.

(*m*) See post, "Forms of Leases," "Covenants," &c.

(*n*) *Ante*, pp. 212, 262.

be opened, to prevent injuries which might otherwise arise to persons or to cattle on the surface; for giving the lessor power to purchase the machinery and all or any portion of the materials at a valuation; for re-entry, on breach of any of the covenants or conditions of the lease; for enabling the lessees to abandon or determine the lease upon certain terms, at certain specified periods, wholly independent of the other terms or conditions of the lease or the breach of any of the covenants (*o*), and for referring all disputes to arbitration. The lessor should enter into the usual covenants for title, quiet enjoyment, and for further assurance; but he frequently declines to covenant for title, upon what principle it is difficult to understand. No precise form of words is necessary to constitute a covenant, it is sufficient if an agreement to do or not to do a certain thing can be collected from the language of the deed, especially where it commences with the words, "It is hereby agreed by and between the said parties in manner following;" and, as a rule, a covenant is construed favourably for the person in whose interest it is given, and strictly against the covenantor (*p*). A covenant which is decidedly oppressive will not be enforced by a court of equity, or an injunction granted to prevent a breach of it (*q*). A covenant to work a mine and to sink for coals in the usual and customary way, does not imply a duty on the part of the lessees to sink to any depth; it will be sufficient to show that in the opinion of persons of competent skill, the experiments made afforded reasonable proof that there was no coal or mineral which could be gotten, or that the quality of the coal or mineral was of such a description that the working would have been attended with a dead loss (*r*); but if a certain specified amount of coal is agreed to be raised at a certain fixed proportion to be rendered to the lessor, the lessee is bound to raise the coal although at a

Form of covenant.

Oppressive covenants.

Covenant to raise a certain specified quantity.

(*o*) *Friar v. Grey*, 17 L.J. Q.B. 301; 19 L.J. Q.B. 393, Ex. 368; 4 Ho. of Lords' Cases, 565.

(*p*) *Wood v. Copper Miners Co.* 7 C.B. 906; 14 C.B. 428; *James v. Cochrane*, 7 Ex. 177; ante, p. 291, post, p. 301.

(*q*) *Talbot v. Ford*, 13 Sim. 173.

(*r*) *Hanson v. Boothman*, 13 East, 22; *Jones v. Shears*, 7 Car. & P. 346.

loss (*s*); but equity will give relief under the covenant if the lessees will pay the lessor the full amount which he would receive in case the mines were worked (*t*), but there will be no relief against a covenant to pay a certain rent whether the mine is worked or not (*u*). In the case of *Attersoll v. Stevens* (*v*), land was demised to the plaintiff at an annual rent for twenty-one years, with liberty to dig half an acre of brick-earth annually; the lessee covenanted that he would not dig more, or if he did, that he would pay an increased rent of £375 per half acre, being after the same rate that the whole brick-earth was sold for; a stranger dug and took away brick-earth, and the lessee recovered against him the full value of the part taken away, and it was held that he was entitled to reclaim the whole damages.

Sales at  
the pit's  
mouth.

The lessee of a coal mine who covenanted to pay a certain share of all such sums of money as the coals should sell for at the pit's mouth, was held not liable under that covenant to pay to the lessors any part of the money produced by sale of the coals elsewhere than at the pit's mouth; and evidence of the lessees having accounted with the lessors, and paid the share of money produced by the sale of coal elsewhere, was also held not to be admissible to explain the intention of the parties (*w*); and the same interpretation of a similar covenant was held in the subsequent case of *Gerrard v. Clifton* (*x*).

Covenants  
running  
with the  
land.

Where the owners of land granted a water-course to a man and his heirs, who covenanted for themselves, their heirs, and assigns to cleanse it, this covenant was held to bind the land in the hands of an assignee, for it was a covenant which ran with the land (*y*); and where a lessee covenanted that he would carry away the coals from a

(*s*) *Morris v. Smith*, 3 Doug. 279; *Jervis v. Tomkinson*, 1 H. & N. 195.

(*t*) *Smith v. Morris*, 2 Bro. C.C. 311.

(*u*) *Phillips v. Jones*, 9 Sim. 519; *Marquis of Bute v. Thompson*, 13 M. & W. 487; *Jowett v. Spencer*, 17 L.J. Ex. 367; *Mellers v. D. of Devonshire*, 16 Beav. 252; 22 L.J. Ch. 310.

(*v*) 1 Taunt. 183; see also *Edwards v. Rees*, 7 Car. & P. 340.

(*w*) *Clifton v. Walmesley*, 5 T.R. 564.

(*x*) 7 T.R. 676.

(*y*) *Holmes v. Buckley*, 1 Eq. Ab. 27, pl. 4.



specified colliery, and from any other colliery to be worked by him, at a rate of 2d. a ton, within a certain township, it was held that the covenant ran with the land, and consequently that the assignees were bound by it (z).

In a case where there was a demise of all mines and beds of coal which had been or thereafter should be discovered or opened, the lessee covenanted that he would work the mines in a proper and workmanlike manner; but it was held that inasmuch as the mines had not been worked at all, the defendants were not liable under the covenant for not working them; the subject-matter of the demise being not all the mines under the lands, but only such of them as had been or should be discovered or opened (a).

A very important decision was given in the case of *Foley v. Addenbrooke* (b) upon the construction of a covenant to yield up in repair the machinery, buildings, and fixtures, and in that case the portion of the machinery which was to be left, and the state in which the buildings were to be restored, after removing such things as were not within the covenant, are clearly defined (c).

Covenant for yielding up in repair machinery and fixtures.

The lessees under a lease of coal mines covenanted that they would deliver to the lessor two equal thirteenth parts of all coal which should be raised from the mines demised during the term, or would pay him quarterly the value thereof in money, and that in case at the end of the first quarter of any year such quarterly deliveries should not have equalled in value, or such quarterly payments should not have equalled in amount the sum of £38 10s., the lessees should also pay, at the end of every such first quarter, such additional rent or sum as should make up the sum of £38 10s.; and in case at the end of the second quarter, such deliveries or payments for that and the preceding quarter should not have equalled in value or amount the sum of £75, then the lessees should also pay, at the end of the second quarter, such further sum as would make up £75;

When excess of produce may be set off against a deficiency.

(z) *Hemmingway v. Fernandez*, 12 L.J. Ch. 130.

(b) 13 M. & W. 174; s.c. 14 L.J. Ex. 169.

(a) *Quarrington v. Arthur*, 10 M. & W. 335; s.c. 11 L.J. Ex. 418.

(c) See title "Fixtures," post, p. 317.

and in case at the end of the third quarter such deliveries and payments for that and the two preceding quarters should not have equalled in value or amount the sum of £111 10s., then the lessees should pay, at the end of the third quarter, such further sum as would make up £111 10s.; and in case on the 24th of June, in any year, the deliveries and payments for that and the three preceding quarters should not have equalled in value or amount the sum of £150, the lessees should pay on the 24th of June, such an additional sum as would make up £150; it being the intent and meaning of the parties, that the royalties thereby reserved should always amount to £150 per annum at the least; and it was held, that, in calculating the amount of royalty due to the lessor at the end of each year, the lessees were not entitled to set off the excess of royalty accruing in any quarter against a deficiency in the previous quarter; but that the lessees were entitled, at the end of each quarter, to the full sum of £38 10s. (*d*).

Assignee.

The lessee of certain coal mines assigned the lease, the assignee covenanting that his executors, administrators, and assigns would at all times during so long as he or they should be in possession or receipt of the rents, produce, and profits of the premises, pay to the lessors the rents, galeages, and way-leaves reserved and made payable by the original lease, and observe and perform the said covenants therein contained, and keep indemnified the original lessee in respect thereof; and it was held, that the indemnity was not restricted to the time of the possession, but was binding on the assignees whether in or out of possession (*e*).

Waste.

A lease was granted to open and work a quarry, and a covenant was inserted not to commit any waste, spoil, or destruction, by cutting down trees which were excepted from the lease; and it was held that the effect of the cove-

(*d*) *Bishop v. Goodwin and others*, 14 M. & W. 260; see also a similar covenant in *Buckley v. Kenyon*, 10 East, 139.

(*e*) *Crossfield v. Morrison*, 7 C.B. 286; s.c. 6 D. & L. 608.

nant was that the tenant should not so cut any of the excepted trees, as that such cutting should amount to an excess of the right which it was intended he should exercise, and therefore that cutting trees in a manner necessary to a reasonable exercise of the power to get the stone from the quarry was no breach of the covenant (*f*).

An indenture of lease, by which certain coal mines in the North of England were demised for the term of forty-two years, contained the following covenant by the lessees: Implied covenant to make pits.  
 “And also, that they, the said lessees, their executors, &c., or their servants or workmen, should and would, once in every month, or oftener, during the said term, at their own expense, draw to bank at some of the pits or shafts of the said collieries, or coal mines, thereby demised (provided that the same should be pits or shafts from which the coals of the thereby demised collieries should not be worked by an outstroke),” *i.e.* by means of pits or shafts upon the surface of the adjoining mines, “and lay in some convenient place in that behalf, upon the said lands and premises of the said lessors, for the said lessors, their heirs or assigns, all the manure, compost, and dung, to be made and bred by the horses employed underground in working the said demised collieries, and should spend and bestow so much thereof, and of all such dung, manure, compost, &c., as should be made, bred, or arise in, under, or upon the said estate, lands, and premises of the said lessors, or any part thereof, as might be necessary for that purpose, in dressing and manuring any lands or grounds which they, the said lessees, their executors, &c., or any of them, might, during the said term thereby granted, occupy as tenants to the said lessors, or either of them, their or either of their heirs or assigns.” The lease contained various clauses which referred to the pits or shafts to be sunk on the demised premises, but did not contain any express covenant by which the lessees were either bound to sink a pit, or to work the mines; and it was also doubtful whether the lessees were empowered to work the demised mines by “outstroke;” but it was held, that no covenant could be

(*f*) *Doe d. Rogers v. Price*, 8 C.B. 894.



implied from the preceding covenant, which imposed upon the lessees, upon the mines being worked, and manure being made within them, the obligation of sinking a pit or shaft upon the demised lands, although they might be liable for a breach of covenant in working the mines by outstroke. Parke, B., said: "According to the rule of law on this subject—and the whole case turns upon the application of that rule—no precise words are necessary to constitute a covenant, provided we are able to collect an agreement by the parties that a certain thing shall be done, that will be sufficient to enable us to say that a covenant is created; but we must be satisfied that the language does not merely show that the parties contemplated that the thing might be done, but it must amount to a binding agreement upon them that the thing shall be done. Now it is impossible to read the covenants of this lease without supposing that the parties contemplated that the pits would probably be made, for it cannot be supposed that the lessees would enter into such a lease as this without intending to work the mines; and I think it appears, from the different parts of this instrument, that if the mines were worked, the parties thought they would be worked by means of pits made on the demised premises; but they have not introduced words into the indenture making it obligatory upon them to work at all; the consequence is, that there is not any such covenant as imposes an obligation on the defendants to make a pit" (g).

Construction of covenant to be stated to a jury by the judge.

In an action upon a covenant, or other written contract, it is the duty of the judge to state to the jury its construction, as a matter of law, or to explain to them how far its construction may be modified by evidence or usage, when such evidence is admissible; and in cases where such evidence is not admissible, and the construction of the contract is a question of law, his omitting to direct the jury as to its construction is a misdirection; and in an action on a covenant in a demise of coal mines, accompanied by a proviso that in case the coals, so far as the same could be fairly wrought, should be worked out prior to the expira-

tion of the term, the rent should cease, it was held a misdirection in the judge to leave the meaning of that proviso, especially with reference to the words "fairly wrought," to the jury, upon evidence as to the impossibility of working the mine at a profit; the question of profit having no bearing upon the proviso, which regarded only the manner of working; and the construction of which was a question of law for the judge to determine by his direction (*h*).

A mining lease, containing a covenant by the lessee not to assign without the consent of the lessor; the lessee made an agreement with three other persons to give up his right in the lease to them, and to execute all necessary deeds to carry the arrangement into effect, and that in the meantime the agreement should have the same force as if such deeds had been executed; no consent of the lessor had been obtained, nor were any such deeds executed; the three persons entered into possession and worked the mines, and after a time, the three assigned all their interest in the mines and other property comprised in the lease to a man of straw; and it was held (overruling a decision of the Master of the Rolls), that the three being mere equitable assignees of the lease were not liable to the lessor for the rents and covenants in the original lease for the time they were in possession of the property demised. The relation between landlord and tenant is legal, and not equitable (*i*).

In a lease of premises, W. covenanted to erect, within a certain time, a steam-engine and other machinery for the purpose of carrying on the business of a shipwright, and that he would not remove, but would yield up such shipwright's machinery to the lessors at the expiration or determination of his term, without any payment, provided that such covenant was not to apply to any machinery erected by W. for any other purpose than that of carrying on the business of a shipwright; it was further agreed, that if W. should become bankrupt, the lessors might re-enter the premises, and take possession of the shipwright's ma-

(*h*) *Griffiths v. Rigby*, 25 L.J. Ex. 284.

(*i*) *Cox v. Bishop*, 26 L.J. Ch. 389.

chinery as their own property; W. entered, and erected machinery for the purpose of carrying on the business of a shipwright, and also other machinery; he afterwards became bankrupt, and his assignees took possession of the premises and of the last-mentioned machinery, and before the expiration of a reasonable time for removing such machinery, the lessors prevented the assignees from removing it; but it was held, that the assignees had a good cause of action; that according to the terms of the covenants of the lease, the lessors were on determination of the tenancy by bankruptcy to become entitled to the shipwright's machinery only, and that the other machinery belonged to the assignees of the bankrupt, who must have a reasonable time, after the expiration of the tenancy, to remove such machinery (*j*).

When covenant to refer to arbitration is void.

J. S. granted a lease of a coal mine to E. S. for a term of years at a rent or royalty of one-eighth of the value of the coal mine, and E. S. covenanted to raise at least 4000 tons, and it was thereby agreed between the parties that if any difference or question should arise between them touching any covenant, matter, or thing expressed in the deed, or the meaning thereof, it should be settled by two arbitrators, to be nominated within two months after the difference arose; with mutual covenants to obey and perform the award, and not to bring any action at law or in equity without first submitting all matters to arbitration; and it was held (*Martin, B., dubitante*), that as the agreements and covenants to refer were absolute to oust the jurisdiction of the superior courts, they were void for that purpose, and could not be pleaded in bar to an action for not raising 4000 tons of coal (*k*).

To yield up in repair.

Where a lessee of a coal mine had covenanted at the end of a term to yield up the works and mines, and all ways and roads, in such good repair, order, and condition, that the works might be continued and carried on by the

(*j*) *Stansfeld v. the Mayor, Aldermen, and Burgesses of Portsmouth*, 4 C.B. N.S. 120.

(*k*) *Horton v. Sayer*, 29 L.J. Ex. 28.



lessor, it was held that such covenant did not include wooden sleepers used for the purpose of a railway (*l*).

A lessor of a mine or vein of coal, lying under certain lands, covenanted that the lessee should and might peaceably and quietly have, hold, occupy, possess, and enjoy the mine, without any let, suit, trouble, molestation, interruption, or disturbance whatsoever; the lessor in working ironstone, lying between the surface of the soil and the demised coal, caused part of the roof of the coal mine to crush and fall in, and to be flooded; the working of the ironstone was done in a workmanlike manner; but it was nevertheless held, that these acts constituted a breach of the covenant, for which the lessee might maintain an action, and being continued up to the time of the action, also entitled him to an injunction restraining the lessor from working the ironstone within such a distance of the surface as interfered with the lessee getting the coal with full advantage and profit (*m*). It has also been held, that there is in every demise an implied contract for quiet enjoyment, but not for good title; a similar contract is not implied in an agreement to give a lease containing a covenant for quiet enjoyment; or on a parol tenancy from year to year beyond the duration of the lessor's interest (*n*).

Quiet enjoyment.

Whether a covenant is joint, or several, or both, is a question which was raised in the case of *Bradburne v. Botfield* (*o*), and the dictum of Mr. Baron Parke in that case would seem to deserve attention. He says: "In the case of *Sorsbie v. Park* (*p*), Lord Abinger and myself, on referring to the established rule, as laid down by Lord Chief Justice Gibbs in the case of *James v. Emery* (*q*), approved of Mr. Preston's qualification and explanation of it in his edition of the *Touchstone*, 166, namely, that, if the language of the covenant was capable of being so construed, it was to be taken to be joint or several, according to the interest of the parties to it. Mr. Preston adds, 'that the general rule

Joint and several covenants.

(*l*) *Beaufort v. Bates*, 31 L.J. Ch. 481. 31 L.J. Q.B. 257; *Penfold v. Abbott*, 32 L.J. Q.B. 67.

(*m*) *Shaw v. Stenton*, 2 H. & N. 858; 27 L.J. Ex. 253. (*o*) 14 M. & W. 572.

(*p*) 12 M. & W. 146.

(*q*) 2 Moore, 195.

Joint and  
several co-  
venants.

proposed by Sir Vicary Gibbs, and to be found in several books, would establish that there was a rule of law too powerful to be controlled by any intention, however express; and I consider such qualification to be perfectly correct, and at variance with no decided case, as it is surely as competent for a person, by express joint words, strong enough to make a joint covenant, to do one thing for the benefit of one of the covenantees, and another for the benefit of another, as it is to make a joint devise where it is for the benefit of one. I mention this because the Court of Queen's Bench, in the case of *Hopkinson v. Lee* (*r*), have supposed, that Lord Abinger and myself had sanctioned some doctrine at variance with the case of *Anderson v. Martindale* (*s*), and *Slingsby's case* (*t*) which it was further from my intention, and, I have no doubt, from Lord Abinger's, to do; it being fully established, I conceive, by those cases, that one and the same covenant cannot be made both joint and several with the covenantees. It may be fit to observe, that a part of Mr. Preston's explanation, that, by express words, a covenant may be joint and several with the covenantors or covenantees, notwithstanding the interests are several, is inaccurately expressed: it is true only of covenantors, and the case cited (from Salkeld, p. 393), relates to them; probably Mr. Preston intended no more, and I never meant to assent to the doctrine that the same covenant might be made, by any words, however strong, joint and several, where the interest was joint; and it is this part, I apprehend, of Mr. Preston's doctrine to which the Court of Queen's Bench objects. I think it right to give this explanation, that it may not be supposed that there is any difference on this point with the Court of Queen's Bench." And in the case of *Haddon v. Ayers* (*u*), Lord Campbell says: "When there is a separate interest apparent, one of several covenantees may maintain a separate action, unless there are such words as to make the covenant clearly joint and not several" (*v*).

(*r*) 14 L.J. Q.B. 104.

(*s*) 1 East 497.

(*t*) 5 Rep. 18<sup>b</sup>.

(*u*) 28 L.J. Q.B. 113.

(*v*) See also *Duke of Northumberland v. Errington*, 5 T. R. 522; *Mills v. Ladbroke*, 13 L.J. C.P. 122.

A general power to grant leases will enable the person to whom it is given, to grant a lease of a mine already opened, and if mines are included in the power, unopened mines also, even if waste is prohibited (*w*). In the case of *Campbell v. Leach*, a power was given by a settlement to lease lands except the capital messuage and warren, &c., at the best rent, but no authority could thereby be inferred to commit waste; open mines were under lease at the time of the settlement. The power was exercised, and opened as well as unopened mines were demised by one deed, reserving generally a certain proportion of the produce. The Master of the Rolls held, that the power did not authorize a demise of the unopened mines, and that the lease being of opened and unopened mines, was therefore void (*x*). Upon appeal, it was argued that the case was not like that where two things are granted which are inseparable, and the one is out of the power, and the other within it; in such case the lease might be void as to both. But here the opened and unopened mines were separate, and the rent reserved was not a gross sum for the whole, but a proportion of the profits of the mine; the court overruled the objection; and this, of course, upon legal and not equitable grounds, for if the lease on this objection had been bad at law, it would have been difficult to support it in equity. The decision upon the appeal was clearly right according to Lord St. Leonards (*y*). The addition of the unopened mines, which were not within the power, could not affect the validity of the demise of the open mines, for the reservation operated distinctly and separately on them, and was simply inoperative as to the unopened mines. No portion of the rent reserved for the opened mines attached to the unopened mines, nor did the rent require to be apportioned in consequence of the unopened mines not passing by the power. But where there was an old mine on the estate, worked from a shaft on the adjoining land, a power for trustees with the consent of the tenant for life to lease the heredi-

LEASES  
UNDER  
POWERS.

When  
mines can  
be leased  
under a  
general  
power.

(*w*) *Winter v. Loveday*, Freem.

507; *Whitfield v. Bewitt*, 2 P. Wms.

240; *Daly v. Beckett*, 3 Jur. N.S.

754; ante, pp. 161, 253.

(*x*) *Amb. 740*.

(*y*) *Sugden on Powers*, edit. 1861,

p. 806.



taments, or any part thereof, and the coal, minerals, and stone, within or under the same, together with or separately therefrom, and to demise, likewise, all or any of the hereditaments to be taken in exchange to be made under a power in the settlement, and the coal, minerals, and stone, within or under the same, together with or separately therefrom, for any term not exceeding twenty-one years, reserving the best rent, &c., and so that the person or persons to whom such lease shall be granted, his or their executors, administrators, or assigns, shall not, by any clause therein, be punishable for waste, such a power was held to authorize a lease of unopened mines, and the concluding clause was considered repugnant to the power, and therefore void; the minerals were treated as part of the ordinary profits of the estate, and therefore the tenant for life was held to be entitled to the rent reserved (z).

Construc-  
tion of  
powers  
generally.

Where a settlement of personal property is made, and the parties covenanted to settle all future acquired property upon the same trusts, and subject to the same powers, or as near thereto as the nature of the tenure of the property would admit of; it was held, that this authorized the insertion of a power to grant mining leases, in the settlement of subsequently acquired freeholds, the prior owner having granted such leases, though the mines had never been effectually worked under them (a). A power was reserved in a deed of settlement to a tenant for life, to lease collieries and coal mines, "together with all such powers, authorities, accommodations, liberties, and privileges as shall be necessary, or are usually contained in leases of collieries or mines in the neighbourhood where the collieries or mines are situate, for seeking, winning, working, drawing, taking, and carrying away the coals within and under the same;" and it was held, that the power authorized the building of cottages in convenient places for the workmen (b). The word rent, in powers of leasing, has been construed to mean, not money merely, but any equivalent adapted to the nature of the demise; therefore, upon a lease of mines, a due proportion of the pro-

What is a  
rent.

(z) *Daly v. Beckett*, 24 Beav. 114. (b) *Morris v. Rhydydefed Colliery Co.*, 28 L.J. Ex. 119.  
(a) *Scott v. Steward*, 27 Beav. 367.

duce may be reserved as a render in lieu of money, when the power requires a "rent" generally to be reserved (*c*).

Every settlement of lands should, therefore, contain a power to grant leases with or without impeachment of waste; and to prevent, as far as possible, any differences of opinion on the nature and extent of the power, the power should state whether opened or unopened mines, or both, and what minerals or seams of coals are to be demised under the power; and the power should be so worded as to include a way-leave, as in a recent case it has been decided that an ordinary power to lease will not authorize a lease of way-leaves (*d*).

A lease which exceeds the power under which it is granted is void at law, but it will be supported in equity for such an extent as is authorized by the power (*e*); but if the power has been so far exceeded as to render it difficult to distinguish between the excess and the right exercise of it, the lease will not be supported; as, for instance, in the case of one entire rent being reserved for distant lands, which are not both within the power (*f*). The date of a lease is *primâ facie*, but not conclusive, evidence of the execution of the instrument on that day, and in powers the date of an instrument may imply that the power had not been duly executed; it will, therefore, be competent to show, notwithstanding the date, that the power was followed (*g*).

In all cases where it has been attempted to exercise a power in a regular way, which afterwards proves defective, equity will assist in rectifying the mistake or error, consistently with a regard to the interests of parties entitled *a priori* as well as in reversion (*h*); and recently several Acts of Parliament have been passed, for granting relief against defects in leases made under powers of leasing; in addition to several other Acts conferring enlarged powers of leasing upon persons interested under settlements (*i*).

(*c*) *Campbell v. Leach*, Ambl. 740; Bassett's case cited therein, p. 748.

(*d*) *Ricketts v. Bell*, 1 De G. & S. 335.

(*e*) *Campbell v. Leach*, Amb. 740; *Roe v. Prideaux*, 10 East, 185; *Parry v. Bowen*, 3 Ch. Rep. 6; *Alexander v. Alexander*, 2 Ves. Sn. 645; *Doe v. Calvert*, 2 East, 376.

(*f*) *Doe d. Douglas v. Lock*, 2 Ad. & El. 705; *Doe v. Rendle*, 3 M. & S. 99; *Doe v. Stephens*, 6 Q.B. 208.

(*g*) *Doe v. Robson*, 15 East, 32.

(*h*) *Doe v. Weller*, 7 T. R. 478; *Campbell v. Leach*, amb. 740.

(*i*) 12 & 13 Vic. c. 26; 13 & 14 Vic. c. 17, and Acts cited, ante, pp. 280-287.

Equitable jurisdiction and relief.

Statutory provisions.

Leases on  
lives.

A power to lease for three lives authorizes a lease for two lives, or if for twenty-one years for any less period, or for the full period, determinable at the option of the lessee at an earlier period (*j*); but a power to lease for lives will not authorize a lease for years determinable upon lives; if, however, the power is to lease for not exceeding twenty-one years or three lives, a lease for any term determinable upon not more than three lives, will be supported (*k*); but a power to lease for any period not exceeding three lives and forty-one years will support a lease for three lives and forty-one years, but not a lease for years determinable upon lives (*l*). The expressions, "or for thirty years, or for any other number of years determinable upon three lives," will justify a lease for thirty years absolutely, or for any other term determinable upon lives (*m*); the expression "not exceeding twenty-one years" will enable the lessor to determine the lease, or to call upon the lessee to elect to put an end to the lease.

Leases in  
reversion  
or pos-  
session.

A general power to lease for a certain number of years without expressly stating whether such leases are to be granted in possession or reversion, will only authorize a lease in possession, and if the power is to lease in possession only, there will be no power to lease in reversion, even although the lands were then under lease (*n*); but if a general power to lease lands which were under lease at the time of creating the power, can be fairly construed to authorize leases in reversion, a Court of Equity will sanction such leases (*o*). A power to grant leases in possession as well as in reversion, will not justify leases being made both in possession and reversion in respect of the same lands, neither will such a power authorize repeated leases, unless the intention of conferring such a power is clearly expressed (*p*).

(*j*) *Carter v. Claycoll*, 1 Leon, 308;  
*Isherwood v. Oldknow*, 3 Maul. & S.  
382; *Edwards v. Millbank*, 4 Drew.  
606.

(*k*) *Whitlock's case*, 1 Brownl.  
169; *Churchman v. Harvey*, Amb.  
335.

(*l*) *Roe v. Prideaux*, 10 East, 158;  
*re Crommellin Est.* 1 Ir. C.L. 182;  
*Blackhall v. Nugent*, 5 Ir. Ch. 323.

(*m*) *Lutwich v. Piggot*, 3 Mod.  
268.

(*n*) *Doe v. Harvey*, 1 B. & C. 426.

(*o*) *Marquis of Northampton's case*,  
*Dyer*, 357<sup>a</sup>; *Coventry v. Coventry*, 1  
Com. 312; *Harcourt v. Pole*, 1 And.  
273.

(*p*) *Winter v. Loveday*, Bridg. by  
Ban. 592 n.



## LICENSES.

*Definition of a License—when it does and does not confer an interest in land—parol licenses—licenses by deed—erroneous judgments—cases overruled—what a licensee's interest amounts to—rights of a landlord who makes a parol demise reserving minerals.*

THE nature of a license and its legal incidents were clearly defined by Chief Justice Vaughan; he says: "A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful; as a license, to go beyond the seas, to hunt in a man's park, or to come into his house, are only actions which, without license, had been unlawful; but a license to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants; so to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood, and warming him, they are licenses; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and in the wood burnt; so as in some cases, by consequence and not directly, and as its effect, a dispensation or license may destroy and alter property" (a).

It follows that a license may, or may not, confer an interest in the land; if it does, it is a grant of land, and void unless by deed (b), but if it does not, it is a mere license and may be by deed or parol. A mere license is not exclusive unless it clearly appears from the instrument creating it, that it was intended to be so, but if great expenditure is incurred under a license, a Court of Equity would under some circumstances prevent a second license being granted

(a) *Thomas v. Sorrell, Vaughan*, 351; *Bailey v. Stevens*, 31 L.J. C.P. 228.  
 (b) *Bailey v. Stevens*, 31 L.J. C.P. 228.

Definition  
of a license.

Parol li-  
cense.

which would interfere with the first (*c*). A parol executory license is revocable at any time, and if the owner of land grants a license to go over or to do any act upon his land, and then conveys away that land, there is an end to the license, for it is an authority only with respect to the soil of the grantor, and if the soil ceases to be his soil, the authority is instantly gone. A license is a thing so evanescent that it cannot be transferred (*d*).

Erroneous  
judgments.

The distinction between a mere license or dispensation and a license or dispensation which confers an interest in land has not always been maintained. Webb and Pater-noster, before the Statute of Frauds, decided that a parol license to stack hay upon land did not confer an interest in the land (*e*); in *Wood v. Lake*, a parol agreement to stack coals on land for seven years, with the sole use of the land, was held to be a mere license (*f*); in the case of *Chetham v. Williamson*, where a power was given to enter upon land, and to search for, and take, and carry away coals, it was also held that this was a mere license (*g*); and in the case of *Norway v. Rowe*, a grant to dig for tin, copper, and other minerals was held not to pass any interest in the land to the grantees (*h*). These and other cases of a like nature appear to have been decided without a due regard to the dictum of Chief Justice Vaughan. The judgment in *Wood v. Lake* was questioned by Sir E. Sugden (*i*), and *Chetham v. Williamson*, *Hanley v. Wood*, *Norway v. Rowe*, and other similar cases, must now be considered to have been over-ruled, as will appear from the following authorities. In the case of *Hewlins v. Shippam* (*j*), all the earlier authorities are there collected, and it is clearly laid down that a license or liberty, among other things, cannot be created or accorded to an estate of inheritance or freehold without deed (*k*).

Cases over-  
ruled.

(*c*) 4 Leon, 147; *Doe d. Hanley v. Wood*, 2 B. & Ald. 724; *Norway v. Rowe*, 19 Ves. 155.

(*d*) *Wallis v. Harrison*, 4 M. & W. 544; *Wood v. Leadbitter*, 13 M. & W. 838; *Taplin v. Florence*, 10 C. B. 764; *Adams v. Andrews*, 15 Q.B. 296; *Rof-fey v. Henderson*, 17 Q.B. 574; *Cole-man v. Foster*, 1 H. & N. 40.

(*e*) Palm. 71.

(*f*) Say, 3.

(*g*) 4 East, 469.

(*h*) 19 Ves. 158.

(*i*) *Vendors and Purchasers*, Edit. 1862, p. 124.

(*j*) 5 B. & C. 230; *Perry v. Fitz-howe*, 8 Q.B. 778.

(*k*) *Shep. Touch*, 231; 2 Roll Abr. 62, Co. Litt. 9<sup>a</sup>.

The doctrine as above laid down was again recognized, and was subsequently acted upon in *Bryan v. Whistler* (*l*), *Cocker v. Cowper* (*m*), *Wallis v. Harrison* (*n*), and *Wilkinson v. Proud* (*o*). The same question again came before the court in *Wood v. Leadbitter* (*p*), and it is there distinctly asserted that no incorporeal inheritance affecting land can be created or transferred otherwise than by deed, and this doctrine has since been upheld (*q*). It is therefore of essential importance that no misunderstanding should exist upon the subject; if a license to explore the soil and carry away the substance is given it must be by deed (*r*), and then it is no license, but a grant of the land itself; if, on the other hand, a privilege to do anything on the land which does not divest the grantor of his interest in the soil, such a privilege may be given by a parol license, but if so given it is revocable at pleasure, or it may be by deed, then it will be irrevocable.

A licensee has no interest in minerals till he has actually entered the land and severed them from the inheritance; after entry, but not before, he may maintain an action of ejectment or trespass (*s*). If rent is reserved in specie on a license, it cannot be distrained for unless the landlord be the king (*t*), but it may be recovered in an action of debt; and if a rent is reserved in kind, as in the case of tolls or dues, then trover will lie, but payments under a parol license to dig earth and make bricks has been held to be in the nature of rent and to pass with the land (*u*). Interest of a licensee.

If a landlord makes a parol demise of land reserving the minerals, the demise not being by deed, the reservation cannot operate as a grant, but being by parol, it will operate Parol demise reserving minerals.

(*l*) 8 B. & C. 288.

(*m*) 1 C. M. & R. 418.

(*n*) 4 M. & W. 538.

(*o*) 11 M. & W. 33.

(*p*) 13 M. & W. 838.

(*q*) See also *John v. Jenkin*, 1 Cr. & M. 227; *Daniel v. Gracie*, 6 Q.B. 145; *Morgan v. Morgan*, 14 L.J. C.P. 5; *Adams v. Andrews*, 15 Q.B. 284; *Roffey v. Henderson*, 17 Q.B. 574.

(*r*) Ante, pp. 311, 268.

(*s*) *Doe d. Hanley v. Wood*, 2 B. & Ald. 724; *Rogers v. Brenton*, 10 Q.B. 52.

(*t*) *Co. Litt.* 47<sup>a</sup>, 142<sup>a</sup>, 144; *Dalston v. Reeve*, 1 Ld. Raymond 77; *Rowe v. Brenton*, 8 B. & C. 737; *Crease v. Barrett*, 1. C. M. & R. 919.

(*u*) *Exparte Hankey*, 1 Mont. & Mac. 247.



as a license for the landlord to enter the land and take the minerals to the same extent as if there had been a grant (v).

### SALE OF SHARES.

*Contract not within the Statute of Frauds unless the Shareholders are jointly interested in the land—parol contract, when a contract is void, or voidable—fraud—bankruptcy—usage of brokers in contracts—when abstract of title can be demanded—garnishee.*

Contract  
not within  
Statute  
of Frauds.

Unless  
there is a  
joint in-  
terest in  
land.

A CONTRACT for the sale of shares in a mine is not within either the 4th or 17th sections of the Statute of Frauds, on the principle that it does not constitute an interest in land, but only an interest in the severed ores, the machinery, and personal effects of and belonging to the mine, and the skill and labour of the workmen (w). *Vice v. Lady Anson* (x), and other cases from which an opposite opinion might be inferred, must therefore be considered so far overruled. But although a contract for the sale of shares in a mine is not within the Statute of Frauds, yet it is quite possible for a mining company to be so constituted, and to be so interested in land, as to bring a contract or sale of a share, or an interest in such company, within the statute. In a case which occurred in Ireland (y), where the company had many mines at work in different parts of Ireland, some purchased, others rented, and had built and were possessed of workmen's houses, as well as steam-engines and smelting houses, it was held that a sale of a share in that company was a sale of a share in the houses and land of the company, and therefore within the statute; in *Toppin v. Lomas* (z), a contract for the sale of the Westminster Improvement Bonds, which were secured by a mortgage of land, was held to be a contract for the sale of an interest in or concerning land within the 4th

(v) *Hewit v. Isham*, 7 Ex. 77.

(w) *Ante*, p. 269; *Hilton v. Giraud*,  
1 De Gex & S. 187; *Myers v. Perigal*,  
21 L.J. C.P. 217; 22 L.J. Ch. 431;

*Watson v. Spratley*, 10 Ex. 222;  
*Powell v. Jessop*, 18 C. B. 336.

(x) 7 B. & C. 409.

(y) *Boyce v. Green, Batty*, 608.

(z) 16 C. B. 145.

section of the statute; and in *Powell v. Jessopp*, although the decision in *Watson v. Spratley* was upheld as an authority to show that shares in a mine worked upon the Cost-book principle do not constitute an interest in land, the majority of the judges avoided binding themselves by any expression of opinion of their own, but rested their judgment entirely upon the authority of *Watson v. Spratley (a)*; the Chief Justice expressed himself to the effect, that the sale does not give an interest in land, but a right to an account of the profits (*b*). The result of the authorities, therefore, would seem to be, that if there be a joint interest in land, in the different shareholders, so to speak, as they call themselves, of a mine, that must pass under the 4th section of the statute; or, on the other hand, if the real interest of the shareholders is merely a divisible portion of it, arising out of the employment of their capital in the working of the mine, that is no interest in land within the meaning of the Statute of Frauds (*c*).

A contract for the sale of shares, then, not being an interest in land, or within the statute, may be by parol, whether the shares are interests in a Cost-book mine, or any other unincorporated or unregistered company, or even in an incorporated or registered company, unless some form of transfer is prescribed by the rules and regulations of the association, or the deed of incorporation (*d*).

If an entire agreement be made for the sale of land and shares, and the agreement as to the land be within the statute, and void, it cannot be supported as to the shares which were sold with it (*e*); and if the agreement be a valid one, yet no property in the shares vests in the purchaser before the contract is executed (*f*). The purchaser will be justified in refusing to execute the contract on the

Parol contract.

When a contract is void or voidable.

(a) 10 Ex. 222.

(b) 18 C. B. 336; s.c. 25 L.J. C.P. 199.

(c) Lord St. Leonards, V. & P. Edit. 1862, p. 127.

(d) *Bligh v. Brent*, 2 You. & C. 268; *Myers v. Perigal*, 21 L.J. C.P. 217; 22 L.J. Ch. 431; *Hilton v. Giraud*; 1 De Gex & S. 187; *Northey v. Johnson*, 19 L.T. 104; *Courteis v.*

*Johnson*, cited in *Watson v. Spratley*, 10 Ex. 242.

(e) *Earl of Falmouth v. Thomas*, 1 C. & M. 89; *Vaughan v. Hancock*, 3 C. B. 766; *Hodgson v. Johnson*, Ell. B. & Ell. 685.

(f) *Lanyon v. Toogood*, 13 M & W. 27; *Sleddon v. Cruikshank*, 16 M. & W. 71.

ground of fraud—such as, false representations respecting the state of the mine, or the liabilities of the company. These and similar questions will be discussed in another part of the work (*g*).

Bank-  
ruptcy.

If a person contracts for shares, and it is necessary for him to sign a deed before his title is complete, and he afterwards becomes bankrupt without signing the deed, the assignees cannot recover the shares in trover, against another person who has signed the deed and received a voucher certifying him to be the proprietor; the assignees have only an equitable right to compel the person into whose names the shares have been transferred to compel an assignment thereof from him to them (*h*).

Usage of  
brokers in  
contracts.

Evidence of the usage of brokers will be admitted to explain the terms of a contract for the sale of shares. In *Field v. Lelean*, it appeared that F., a broker in mining shares, sold L., also a broker, some shares in a mine; the sale note ran thus: "June 18th, 1859. Sold L. 250 5120th shares in Wheal Charlotte, at £2 5s. per share; £560 10s. for payment, half in two, half in four months." The bought note was in similar terms; and it was held, in an action by F. against L. for not accepting and paying for the shares, that evidence was admissible of a usage among brokers in mining shares that, on contracts for the sale and purchase of such shares, the delivery of the shares should take place concurrently with and at the time agreed upon for the payment; and that the purchaser was not at liberty to demand the delivery of them before the time of payment (*i*).

Abstract of  
title.

A contract not being an interest in land, does not entitle the purchaser to an abstract of the title of the seller, but only reasonable evidence that the shares agreed to be sold are what they profess to be, and that the proposed form of transfer will give him a valid title to the shares (*j*).

Garnishee.

Some shares were purchased in a mining company by A from B; B executed a transfer; A re-sold and trans-

(*g*) *Schmoeck*, 5 Bing. 521; *Jennings v. Broughton*, 22 L.J. Ch. 583; *Bedford v. Bagshaw*, 4 H. & N. 538.

(*h*) *Dawson v. Rishworth*, 1 B & Ad. 574.

(*i*) 30 L.J. Exch. 168.

(*j*) *Curling v. Flight*, 2 Phill. 614.



ferred the shares to C, and handed over the two transfers to C; C, on applying to the secretary of the company to register the transfer, found that an attachment from the Lord Mayor's Court had been lodged against B, and the secretary refused to register either transfer until the attachment had been withdrawn. On a motion for a prohibition to restrain proceedings under the attachment, it was contended, on the authority of *Watson v. Spratley*, that shares were not goods and chattels, and, therefore, not attachable as such under the customs of the City of London;—the Court refused to grant the prohibition, on the ground that the secretary of the company might have goods and chattels in his possession belonging to B, but it does not clearly appear that shares are goods and chattels in such a sense, as to make them liable to an attachment (*k*).

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#### MACHINERY—FIXTURES.

*Distinction between trading and mining fixtures—machinery, engines, boilers, &c., may be removed—premises not to be damaged—respective rights of a mortgagee and assignees of a bankrupt—the mode and object of erection govern the ownership—result of decisions—machinery distrainable for rent—when machinery and fixtures should be removed, 14 & 15 Vic. c. 25.*

THE machinery and fixtures erected upon, and being in and about the mine, may be so annexed or attached to the freehold as to make them part and parcel of the realty; it is therefore essential to understand this question. Lord Hardwicke drew a distinction between mining and trading fixtures, and called the former *mixed cases* of enjoying the profits of land and carrying on a species of trade, and therefore distinguishable from the latter, which were fixtures subservient to trade only without any relation to the profits of the land (*l*). The same distinction has been since maintained, and, in a recent case, the respective rights of the landlord and lessee have been clearly de-

Distinction  
between  
trading and  
mining fix-  
tures.

(*k*) *Tredinnick v. Oliver*, 29 L.J. Ex. 466.

(*l*) *Lawton v. Lawton*, 3 Atk. 13; *Dudley v. Warde*, Amb. 118.

fined. A lease of iron mines contained a covenant to repair, and yield up in repair, "the furnaces, fire-engine, iron-works, dwelling-houses, and all other erections, buildings, improvements, and alterations, to be thereafter erected, built, or set up, except the iron-work castings, railways, wimseys, gins, machines, and the movable implements and materials used in or about the furnaces, fire-engine, iron-works, stone-pits, and premises;" and there was a power given to the lessors to purchase those articles, giving a certain notice before the expiration of the lease. The lessors did not avail themselves of the privilege, and the lessees removed certain of the fixtures, and, in so doing, injured the furnaces and iron-works. An action for breach of covenant was accordingly brought, and a verdict taken for the lessors subject to the opinion of the Court on the right of the lessees to remove all or any and which of the articles enumerated and described in the lease. Pollock, C.B., in delivering the judgment of the Court, said: "The rule which the Court thinks the correct one to act upon is this, that whatever was in the nature of a machine or part of a machine, as iron-work or iron-castings, or railways, gins, or movable implements or materials, the defendants had a right to remove; that whatever was in the nature of building or support of buildings, although made of iron, the defendants had not a right to remove; that, with respect to damage to the brickwork, which constitutes a considerable portion of the claim made by the plaintiffs, the defendants were not bound to restore the brickwork in a perfect state, as if the article that it was intended to protect, or support, or cover, were there; it was sufficient for the defendants to exercise their right to remove what the lease gave them authority to remove, and, in doing so, to remove the brickwork, and to leave it in such a state as would be most useful and beneficial to the lessors, or to those who might next take the premises. Now, subject to that rule, perhaps it may be necessary just shortly to mention the items, and dispose of them according to that rule" (*m*). The Court then pro-

Machinery  
may be  
removed.

(*m*) *Foley v. Addenbroke*, 13 M. & W. 195.

ceeded to dispose of the items one by one, and decided that "the tenant might remove the boilers, the boiler grates, the castings and iron-works of the engine and regulator, and of the spring beams, the valve piping, the cupola, the blast pipes, the puddling furnaces, mill furnaces, the boilers of the forge engines, the grates of the boilers, and the castings and iron-works of the engines, the plates from the shears' foundation, the holding-down pins and bed plates, the gasometer and apparatus. But the tenant, whilst effecting such removal, must do as little damage as possible, and leave the premises in a fit state to be used for a similar purpose by another tenant, otherwise he will be answerable for damages for any injury caused to the premises by an improper or careless removal; but the tenant had no right to remove the hoops, bearers, and brickstuffs, those articles not being iron-work in the nature of machine or implements, but being iron-work substituted for additional brickwork, with a view to give additional and, probably, necessary strength to the furnace, which the defendants had no right to remove or to deteriorate (*n*); nor the oak the foundation of the forge-hammer, nor the cast-iron columns used for the support of the building" (*o*). Pans fixed up in salt-works may be removed (*p*).

Premises  
not to be  
damaged.

J. B. and G. B., carrying on business in co-partnership as copper-roller manufacturers, executed a mortgage of the land, mills, or factories of which they were seized in fee, and all and singular the steam-engines, steam-boilers, mill-gear, millwright-work, and machinery then or thereafter to be fixed to the said premises; J. B. and G. B. became bankrupt, after which it was held that the mortgagees were entitled, as against the assignees, to all the machinery which had been fixed to the freehold (*q*); but in case of bankruptcy, all the fixtures which belonged to or might have been removed by the bankrupt will pass to the assignees (*r*).

Respective  
rights of a  
mortgagee  
and as-  
signees of a  
bankrupt.

(*n*) Per Pollock, C.B. in *Foley v. Addenbrooke*, 13 M. & W. 197.

(*o*) *Foley v. Addenbrooke*, 13 M. & W. 197.

(*p*) *Lawton v. Salmon*, 1 H. Black, 259. n.

(*q*) *Mather v. Fraser*, 25 L.J. Ch. 361.

(*r*) *Re Humphries*, 1 Bankcy. Rep. 72.



The mode,  
and object  
of erection,  
govern the  
ownership.

In *Hellawell v. Eastwood*, Parke, B., said: "Whether machines when fixed were parcel of the freehold depended on the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can be easily removed *intégrè, salvè*, et *commodè* or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usus causâ*, or in that of the Year-Book, *pour un profit del inheritance* (s), or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel" (t). *Hellawell v. Eastwood* was commented upon in the subsequent case of *Walmsley v. Milne*. The facts of the last-mentioned case were these: M. being owner of certain land and premises mortgaged them in fee, but still continued in possession of the mortgaged premises, upon which, subsequently to such mortgage, he put up and used for the purpose of his trade a steam-engine and boiler, also a hay-cutter, a corn-crusher, and grinding-stones; all these articles, except the grinding-stones, were screwed or otherwise firmly affixed to the several buildings to which they were attached, but still in such a manner as to be removable without damage to the buildings or to themselves, and the upper millstone lay in the usual way upon the lower grinding-stone; the steam-engine and boiler were fixed for supplying with water certain baths which were on the premises; the hay-cutter was attached to a building adjoining the stable to improve its usefulness as a stable, and the malt-mill and grinding-stones were also intended by M. to add to the value of the premises. In an action by the assignees in bankruptcy of M.; it was held (*Willes, J., dubitante*), that the articles were fixtures, and that although they were trade fixtures, as well as annexed to the freehold after the mortgage, they inured to the benefit of the

(s) 20 Hen. VII. 13.

(t) 6 Ex. 295, 312; *Lancaster v. Eve*, 28 L.J. C.P. 235.

mortgagee, and did not pass to the assignees of the mortgagor (*u*).

The result of the decisions on this subject would seem to imply, first, that the law regards favourably the claim of the lessee or tenant, as against the landlord, to machinery and other articles used in mining operations which can be removed without damage to the inheritance; secondly, that the law prevails with the utmost rigour in favour of the inheritance in all cases of claims made by the executor or administrator against the heir; thirdly, that the executor of a tenant for life is more favourably regarded than the remainderman or reversioner.

Machinery and other fixtures which belong to the proprietors of a mine are distrainable for rent (*v*).

Whenever there is a right to remove fixtures, they should be removed during the continuance of the tenancy and before possession of the land has been given up, otherwise they will become the property of the persons entitled to the land in reversion, and may be recovered, if afterwards removed, either by action at law against the outgoing tenant, or by any other person concerned in such removal (*w*). In conveyances of mining property special provisions should therefore be inserted in reference to the removal of the machinery and fixtures, and a clause inserted giving time for the removal after the termination of the interest in the soil of the outgoing tenant (*x*). Section 3 of 14 & 15 Vic. c. 25 enacts: That if any tenant of a farm or lands shall, after the passing of that Act, with the consent in writing of the landlord for the time being, at his own cost and expense, erect any farm-building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes, or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that

Result of decisions.

When to be removed.

14 & 15  
Vic. c. 25,  
sec. 3.

(*u*) 29 L.J. C.P. 97.

(*v*) *Hellawell v. Eastwood*, 6 Ex. 295.

(*w*) *Minshall v. Lloyd*, 2 M. & W. 459; *Lyde v. Russell*, 1 B. & Ad. 394; *Penton v. Robart*, 2 East, 91; *Davis*

*v. Jones*, 2 B. & Ald. 166; *Weeton v. Woodcock*, 7 M. & W. 14.

(*x*) See post, "Forms;" *Foley v. Addenbrooke*, 13 M. & W. 174, s.c. 14, L.J. Ex. 169; *Stansfield v. Mayor of Portsmouth*, 27 L.J. C.P. 124.

behalf), then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removeable by him, notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so that the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or in case of injury, that he put them in like plight and condition, or in as good plight and condition as they were in before the erection of anything so removed: Provided nevertheless that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same.

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#### TITLE BY WILL.

*When mines are devised separately from the minerals, are unopened as well as opened mines included in the devise? special provision in Wills necessary. Succession Duties Act—decision as to unopened mines.*

What  
mines pass  
by a devise.

WHERE, before the new Statute of Wills (7 Will. IV. and 1 Vic., c. 26), an estate was devised to one person, and the pits and veins of clay under the same estate to other persons, it was held that the latter devise comprised only the pits and veins of clay which at the date of the will (*y*) were open and being worked; whether under the new statute

(*y*) *Brown v. Whiteway*, 8 Hare, 242; *Clavering v. Clavering*, id. 388. 150; *Whitfield v. Bewit*, 2 P. Wms.



such a devise would pass all the minerals, whether open or not, or only the pits and veins open at the date of the will, or at the time of the death of the testator, are questions which do not seem to have been yet decided. Lord St. Leonards has expressed an opinion in favour of such a devise passing all open veins at the time of the death of the testator (z). The question would not arise where the soil was demised without any mention of the minerals, if the devisor was also owner of the minerals, as in that case the minerals would pass under a devise of the land, unless a contrary intention appeared on the face of the will. But where separate devises are made, it should be distinctly stated whether unopened as well as opened mines are to pass, and where there are several seams or strata of coal, whether all or which seam or stratum. There are other circumstances connected with a devise of minerals which deserve attention. Where, for instance, a testator directed that his mines were to be carried on after his decease, without setting apart funds for the purpose, it was first held that all the assets, both real and personal, were liable to be employed in and about the necessary prosecution of the mine; but, on appeal, a contrary decision was pronounced (a). The income of a colliery held on lease was devised by a testator to his wife for life, and, in consequence of a provision being made for the possible breach of covenants under the lease, it was held that the funds must be allowed to accumulate till the expiration of the lease (b). In another case, a devise of collieries was made to the wife of testator, whilst the waggon-ways, rails, and other things were given to the executors, and it was held that the coals raised belonged to the widow (c). A testator gave "all property belonging to him in the county of W——" to his brother and his children in succession; the testator was entitled to collieries, in respect of which debts

Do un-  
opened  
mines pass  
under a  
devise of  
mines?

(z) See Lord St. Leonards, Real Property, edit. 1862, p. 373.

(b) Fletcher v. Stevenson, 3 Hare, 360, s.c. 13 L.J. Ch. 202.

(a) McNeillie v. Acton, 22 L.J. Ch. 820; 23 L.J. Ch. 11.

(c) Stuart v. Earl of Bute, 3 Ves. 212; 11 Ves. 657.

were due to him, and it was held that these debts passed under the above bequest (*d*).

Succession  
Duties Act.

Under the Succession Duties Act, 16 & 17 Vic. c. 51, provision is made for calculating the value of any *opened* mine; and by section 26, it is provided that "the yearly value of any manor, opened mine, or other real property of a fluctuating yearly income, shall either be calculated upon the average profits or income derived therefrom after deducting all necessary outgoings, during such a number of preceding years as shall be agreed upon for this purpose between the commissioners and the successor, before the first payment of duty on the succession shall have become due; or, if no such period shall be agreed upon, then the principal value of such property shall be ascertained, and the annual value thereof shall be considered to be equal to interest calculated at the rate of £3 per centum per annum on the amount of such principal value." In the case of the Attorney-General *v.* the Earl of Sefton (*e*), the question was raised whether, under the Succession Duties Act, "annual value" in the Act means present actual annual value, or any possible or prospective annual value, as the basis upon which succession duty is to be calculated. The judges differed in opinion; the Chief Baron and Wilde, B., held the former opinion; Martin, B., the latter. The Chief Baron said: "A landlord, whose park is over the most valuable mineral property, has a right, in my judgment, to say, 'I prefer living where my ancestors have lived to obtaining the wealth which opening the mine would afford;' and on a succession to such property, in my judgment, the duty ought to be calculated on the fair rental which such a residence and park would command, and without any reference to the value of the undisturbed minerals. The last consideration which I shall present is this: according to the principle involved in the present claim, if the proprietor of a large estate did not make the most of it, and exact the largest rent that it was capable of affording on a succession, the successor might be called

Are un-  
opened  
mines  
liable to  
duties?

(*d*) Tyrone (Earl) *v.* Waterford. (*e*) 32 L.J. Ex. 230.  
(Marquis) 29 L.J. Ch. 486.

upon to pay according to a valuation to be made, not of what its annual value actually was, but upon that which it might be made to produce, a proposition which I think wholly untenable" (*f*).

Succession  
Duties Act.

Mr. Baron Martin reasoned thus: "I cannot believe it was the deliberate intention of the Legislature to relieve such land from the payment of duty. The Act enacts that the term 'succession' shall denote property chargeable with duty; and by section 2, a devolution of property, by reason whereof any person shall become beneficially entitled to property, or the income thereof, shall be deemed to confer 'a succession.' If, therefore, a man becomes beneficially entitled to property, although there be no annual income, there is conferred upon him a succession. Now, the defendant became entitled to the property. It is true that it would not have been wise or prudent in him to have sold it immediately upon his father's death, but, nevertheless, it could have been sold, and many successors to it would, by reason of their pecuniary circumstances, have been compelled to sell it, and it would, in comparison with ordinary land, have produced an enormous money price. The succession to the property was, therefore, a benefit, and a great one, to the defendant. The 10th section imposes a duty, and enacts that there shall be paid in respect of every succession, according to the value thereof, a duty upon such value. Now, as regards individual cases, except in the cases specially provided for, as timber, by the 23rd section, and advowsons, by the 21st, the duty is to be calculated upon the value of an annuity, and there must therefore be an annual sum for the basis of the calculations, and unless one can be attained to, the taxation cannot be effected. The argument, on the part of the defendant, was, first, that such property as the present was intended by the Legislature not to be subject to the tax; but in this I cannot concur. It was said to be like an unopened mine, which it was said is not to be considered in the value for the taxation; but I think this is not so. By the 21st section, the interest of the successor to be taxed is



Succession  
Duties Act.

the value of an annuity equal to the annual value of the property. Now, suppose land containing coal, which the owner did not think fit to let, was situated in a district where the landowners generally let their coal at rents, which is very generally the case, I think, in estimating the annual value, the rent which the owner could get for the coal ought to be taken into consideration, although the mere circumstances of there being coal under land in the neighbourhood of which no coal was being worked might be considered as not materially adding to it. If this were otherwise, the consequence would be, that one owner of land, precisely similarly circumstanced, who let his coal, would pay a higher tax than another who, for his own convenience and possible future benefit, at his own mere will, did not let it. Mines may afford a fluctuating yearly income in two ways: first, to any person actually working the mines; and secondly, to the owner of the mine who does not work it himself, it being a very frequent practice for the owner of land, under which there is a mine, to let it at a minimum rent certain, but to increase it according to the quantity of mineral got. I do not think that any inference could be drawn from this that an unopened mine is to be excluded from the calculation of value under the 31st section. The 26th section was relied upon to show that this was so, but I do not think it does. The section deals with property of a fluctuating yearly income, and the first instance is a manor which is clearly of that character, the second instance is an opened mine. It was argued that the 22nd and 26th sections showed that real property to be taxed, except that in respect of which express provision was made, must be capable of yielding yearly income either not of a fluctuating character or of a fluctuating one; but the 39th section, in my opinion, conclusively shows that it was the intention of the Legislature that all real property, however disposed or circumstanced, should be subject to the tax; and the inference from it seems to me irresistible that all beneficial succession to real property should be subject to the duty" (g).

## CHAPTER XV.

## TITLE BY PRESCRIPTION AND CUSTOM.

*Requisites of a good title by Prescription or Custom. Distinctive characteristics of each. Illegal customs and prescriptions. Proof of a prescription and custom—2 & 3 Will. IV. c. 71—general effect of the Prescription Act—decisions before and since the Act.*

PRESCRIPTION, called in the Roman law *usucapio*, is a personal usage, and belongs to some individual, or corporation aggregate or sole (*a*). It must have a lawful beginning, be certain, and not destructive of the subject matter, or so large as to preclude the ordinary uses of the property by the owner of the soil (*b*), but it need not be reasonable in the same sense as a custom; as prescription simply presupposes a grant which might have been made by the grantor upon any terms not inconsistent with his own rights (*c*), whilst a title by custom is simply a right established by long user without a grant. Mr. Justice Byles, however, in opposition to the dictum in *Rogers v. Taylor* and *Carlyon v. Lovering*, cited below in support of the above proposition, has asserted that a prescription to be good must be both reasonable and certain (*d*); this must mean a reasonable user of the right as established or the court would not presume a grant, and in that sense prescription as well as a custom must be reasonable, but the

Requisites  
of a title  
by pre-  
scription.

(*a*) Co. Litt. 114<sup>b</sup>, 1 Inst. 113<sup>b</sup>; Wilkinson v. Haygarth, 12 Q.B. 837; 4 Rep. 31<sup>b</sup>; Potter v. North, 1 Vent. Dyce v. Hay, 1 Macq. 305.

(*b*) Bell v. Wardell, Willes, 202; Wilson v. Willes, 7 East, 121; Blewett v. Tregonning, 3 Ad. & Ell. 554; Clayton v. Corby, 5 Q.B. 415, 422; Hilton v. Ld. Granville, 5 Q.B. 701; Hilton v. Whitehead, 12 Q.B. 734; Taylor, 26 L.J. Ex. 205, s.c. 1 Hurl. & N. 706; Carlyon v. Lovering, 26 L.J. Ex. 251.

(*c*) Per Martin, B., in *Rogers v. Taylor*, 26 L.J. Ex. 205, s.c. 1 Hurl. & N. 706; Carlyon v. Lovering, 26 L.J. Ex. 251. (*d*) Attorney Genl. v. Mathias, 27 L.J. Ch. 766; Bailey v. Stevens, 31 L.J. C.P. 230.

distinction between the modes of establishing the right must not be forgotten.

Requisites  
of a good  
custom.

A custom is a usage of the inhabitants for the time being of a particular district, and it is the common law within the district to which it extends, though contrary to the general law of the realm (*e*). There cannot be a custom to take a profit *in alieno solo* (*f*), and in order to give any custom the force of law certain requisites must be established; the custom must be reasonable (*g*); it must be confined to a particular district and within reasonable limits (*h*); it must be certain and capable of being ascertained to whom it belongs, and when derogatory from the common law it will be strictly construed (*i*). Evidence of general reputation is admitted in support of it (*j*). Custom may establish different ownerships to different minerals or seams of coal under the same soil, therefore a custom to take one sort of mineral is not conclusive evidence of the right to all others (*k*). The existence of a custom is a question of fact to be determined by the jury, the validity of a custom a question of law to be determined by the court (*l*), and a Court of Equity may direct one of its officers to inquire and report concerning an alleged custom (*m*).

Distinction  
between  
prescrip-  
tion and  
custom.

Whatever may be claimed by custom may also be claimed by prescription, although the extent of the claim by the former title is much broader than by the latter (*n*); but neither prescription nor custom can give a right to the

(*e*) Lockwood *v.* Wood 6 Q.B. 65.

(*f*) Rowe *v.* Brenton, 8 B. & C. 766; Blewitt *v.* Tregonning, 3 Ad. & Ell. 575; Atty. Genl. *v.* Mathias, 27 L.J. Ch. 766; Constable *v.* Nicholson, 14 C.B. N.S. 230.

(*g*) Bell *v.* Wardell, Willes, 202; Clayton *v.* Corby, 14 L.J. Q.B. 364; s.c. 5 Q.B. 415; Rogers *v.* Brenton, 10 Q.B. 57; Race *v.* Ward, 26 L.J. Q.B. 133; 7 Ell. & B. 384.

(*h*) Fitch *v.* Rawling, 2 H. Black, 393; Broadbent *v.* Wilkes, Willes, 360; 2 Stra. 1224; Hilton *v.* Granville, 13 L.J. Q.B. 193; s.c. 5 Q.B. 701.

(*i*) Bac. Abr. Customs, F. Hilton *v.* Granville, *suprà*; Blewitt *v.* Tregonning, 3 Ad. & Ell. 554; Tyson *v.*

Smith, 9 Ad. & Ell. 406, 421; Carlyon *v.* Lovering, 26 L.J. Ex. 257.

(*j*) Rowe *v.* Brenton, 8 B. & C. 737; Brown *v.* Rawlins, 7 East, 409; Weekes *v.* Sparke, 1 M. & Sel. 690; Morewood *v.* Wood, 14 East, 330; Richards *v.* Basset, 10 Barn. & C. 663; White *v.* Lisle, 4 Madd. 214.

(*k*) Curtis *v.* Daniel, 10 East, 273; Seaman *v.* Vawdrey, 16 Ves. 390.

(*l*) Bastard *v.* Smith, 2 Mood. & R. 129; 1 Bl. Com. 76; Edwin *v.* Thomas, 1 Vern. 489.

(*m*) Edwards *v.* Fidel, 3 Madd. 239.

(*n*) Hardy *v.* Hollyday, 4 T.R. 718, 719 n.; Hilton *v.* Lord Granville, 5 Q.B. 701; Carlyon *v.* Lovering, 26 L.J. Ex. 251.



minerals which are part of the land, but a right only to explore the ground for and take and carry them away (*o*); and it is doubtful whether the same claim can be supported both by prescription and custom (*p*). Prescriptions may be released or extinguished by the act of those who are entitled to the right, whilst a custom cannot from its very nature and essence be released and only extinguished by an abandonment of the right (*q*).

In *Broadbent v. Wilkes* (*r*), the custom alleged was as follows: That "when and as often as the lord of the manor or his tenants of the collieries or coal mines"—"have sunk pits in the freehold lands in Halton"—"for the working of the said collieries there to get coals coming and arising from thence," the lord and his tenants "have used and been accustomed to throw, cast, and place"—"the earth, clay, stones,"—"coming therefrom together in heaps on the land near to such pits"—"there to remain and continue, and to place wood there for the necessary use of the said pits, and to take and carry away from thence with carts"—"part of the said coals so laid and placed there, and to burn and make into cinders there other part of the said coals"—"at his and their will and pleasure." And Lord Chief Justice Willes, after pointing out the uncertainty of the alleged custom, proceeded to say that "no custom can be more unreasonable. It may deprive the tenant of the whole profits of the land; for the lord or his tenants may dig coal-pits when and as often as they please, and may in such case lay their coals, &c., on any part of the tenant's land, if near to such coal-pits, at what time of the year they please, and may let them lie there as long as they please;" "so they may be laid on the tenant's land and continue there for ever, though it may be more convenient for the lord to bring them on his own land, which is absurd and unreasonable." The case was removed by writ of error from the Court of Common Pleas into the Court of Queen's Bench,

Illegal custom.

*Broadbent v. Wilkes.*

(*o*) *Wilkinson v. Proud*, 11 M. & W. 33; *Constable v. Nicholson*, 14 C.B. N.S. 230.

(*q*) *Atty.-Genl. v. Mathias*, 27 L.J. Ch. 766.

(*r*) *Willes*, 360; *Wilkes v. Broadbent*, 1 Wilson, 63; 2 Str. 1224.

(*p*) *Blewitt v. Tregonning*, 3 Ad. & Ell. 554, 588.

Unreason-  
able *lex*  
*loci*.

after having been argued several times, but the judgment was unanimously affirmed. Lord Chief Justice Lee said (*s*) that the question was, "whether this was a reasonable *lex loci*, which they held it not to be, inasmuch as it laid a great burden upon the land of the plaintiff, without any consideration appearing, either public or private. That it savoured of an arbitrary power, and might, as laid, put it in the power of the lord totally to deprive the tenant of the benefit of the land, there being no restriction in time, and the word *near* was too vague and uncertain." The report in Wilson, after mentioning the vagueness of that word, remarks also that the custom is "very unreasonable, for it laid such a great burden upon the tenant's land, without any consideration or advantage to him, as tended to destroy his estate, and defeat him of the whole profits of his land, and savours much of arbitrary power, being pleaded to be at the will and pleasure of the lord, and to do it as often and when he pleases;" "and what was said at the bar touching the public utility of coal-pits to the realm cannot be considered, for the pits may be worked without this custom, for ought that appears to the contrary;" "and to support this custom would be to take away the whole benefit of the land granted originally to the copyholder by the lord; and it is a void custom, and contrary to law, that the lessor shall have common *encounter sou demise quia est part del chose demise* (*t*), and this custom being pleaded to be at the will and pleasure of the lord, tends to make him judge in his own cause, which the law will not endure."

Bateson v.  
Green.

Great reliance, however, has been placed on some decisions which upheld customs derogatory from the lord's grant. In *Bateson v. Green* (*u*), the "lord of a manor defended himself successfully against a commoner whose extent of common he had curtailed by taking clay, on proof that the lord had constantly done so." The language of Lord Kenyon in that case is certainly large, though considered by Bayley, J., in *Arlett v. Ellis* (*v*), to be subject to some

(*s*) *Wilkes v. Broadbent*, 2 Str. 1225.

(*u*) 5 T. R. 411.

(*v*) 7 B. & C. 346.

(*t*) See *White v. Sayer*, Palm. 212.

restriction. If, indeed, Lord Kenyon's observations are taken to import that a lord, after granting rights of common, may help himself to any portion of the common to the exclusion of his grantees, such a doctrine is incompatible with many other cases (*w*), and cannot be supported in principle. The two decisions (*x*) in the notes to *Bateson v. Green* are much more cautiously worded; and in that of *Folkhard v. Hemmell*, which is one of the cases so cited, Lord Chief Justice De Grey expressed himself conformably to what we consider the true legal principle: "The defendants justify under the usage. I will not call it a custom, because I look on it as a reserved right of the lord."

And Lord Denman, when reviewing the above-mentioned cases (in *Hilton v. Lord Granville*) (*y*), said: "Whatever the lord can reasonably be supposed to have reserved out of his grant the usage may adequately prove that he did reserve. But a claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument."

And in *Clayton v. Corby* (*z*), Lord Denman said that "in all cases of a claim of right *in alieno solo*, whether immediately or in any degree resembling the present, such claim, in order to be valid, must be made with some limitation and restriction. In the ordinary case of common appurtenant, the right cannot be claimed for commonable cattle without stint, and to any number; but such right is measured by the capability of the tenement in question to maintain the cattle during the winter; 'levancy and cou-

(*w*) Ante, p. 188.

(*x*) *Clarkson v. Woodhouse*, cited 5 T.R. 412; *Folkhard v. Hennett*, cited 5 T.R. 417.

(*y*) 5 Q.B. 780; *Blackett v. Bradley*, 8 Jur. N.S. 588; and ante, p. 188.

(*z*) 5 Q.B. 419; *Bailey v. Stevens*, 31 L.J. C.P. 226.



Customs  
must be  
certain.

chancy' must be averred and proved. Again, in the case of common of estovers, or a liberty of taking wood, called in the books house-bote, plough-bote, and hay-bote, such liberty is not wholly vague and indeterminate, but confined to some certain and definite use. The like of the common of piscary. The nature of these rights is thus compendiously, but we believe accurately, given by Mr. Justice Blackstone (a). 'These several species of commons do all originally result from the same necessity as common of pasture—viz. for the maintenance and carrying on of husbandry: common of piscary being given for the sustenance of the tenant's family; common of turbary and fire-bote for his fuel; and house-bote, plough-bote, cart-bote, and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds;' that is for a certain and definite purpose. In some of these instances, the thing taken is more or less immediately renewable; and it would seem strange if in these such precision and certainty are required, but less in others where the claim is larger, extending, as in the present case, to a right to disturb and remove a portion of the soil itself. Upon reference, however, to the authorities, we find that, in cases not substantially distinguishable from the present, the same rule does, as in reason it ought to do, prevail." And after referring to the cases of *Wilson v. Willes* (b) and *Peppin v. Shakespear* (c), his lordship proceeded to say "that the objection of vagueness and uncertainty was applicable to the plea in *Clayton v. Corby*, and that the nature of the tenement so called, a brick-kiln, leads to no conclusion, one way or the other, as to the extent of the claim and demand upon the soil of the plaintiff. It may have been, at the time of the trespass, of any dimensions and capacity. It may have been, during the thirty years of alleged enjoyment, continually varying; and consequently the quantity of clay required for the purpose of making bricks thereat may have varied also. There is no limit. No amount of clay, measured by cart-loads or otherwise, required, no

(a) 2 Comm. 35.

(b) 7 East, 121.

(c) 6 T.R. 748.

number of bricks, estimated by hundreds or thousands, claimed to be made, is given or attempted. What is it, therefore, but an indefinite claim to take all the clay 'out of and from the said close in which,' &c., or, in other words, to take from the plaintiff, the owner, the whole close? We are of opinion, therefore, that the plea cannot be sustained."

The expression of the court in the case of *Hilton v. Lord Granville*, "that a claim destructive of the subject-matter of the grant could not be set up," was commented upon in the more recent case of *Carlyon v. Lovering* (*d*), from which an inference may be drawn that such a doctrine would not be carried very far against a prescriptive right which was established by unimpeachable evidence. But no case, except it be *Rogers v. Brenton* (*e*), has yet occurred to shake the ancient rule of law that a *profit à prendre* in another's soil cannot be claimed by custom, for this among other reasons, that a man's soil would thus be subject to the most grievous burdens in favour of successive multitudes of persons who could not release the right (*f*); and *Rogers v. Brenton* has never been upheld except in support of an alleged custom in Cornwall—the *lex loci*, in fact, of a province—and is now of doubtful authority (*g*).

In the recent case of *Constable v. Nicholson* (*h*), the judges held that, although a *profit à prendre* out of another man's land cannot be claimed by custom, it might be claimed as an easement. All the cases in which any such right has been held to be good by custom, must, therefore, be taken to have been overruled. *Rogers v. Taylor* (*i*), which supported such a doctrine, supported it simply as an easement. The only way that such a right can be maintained is by prescription; and, in order to make out a prescriptive right, it must be claimed as annexed to land, or

(*d*) 26 L.J. Ex. 257; see also argument in *Rogers v. Brenton*, 17 L.J. Q.B. 34.

(*e*) 10 Q.B. 26; 17 L.J. Q.B. 34.

(*f*) *Atty.-Genl. v. Mathias*, 27 L.J. Ch. 766; *Race v. Ward*, 4 Ell. & B. 705.

(*g*) *Constable v. Nicholson*, 14 C.B. N.S. 238, and post, "Tin-Bounding."

(*h*) *Constable v. Nicholson*, 14 C.B. N.S. 230; 11 W.R. 698.

(*i*) 1 H. & N. 706.

as having been created by a grant, or as a right handed down from ancestor to heir, without intermission. If it be not annexed to land, it must have been created by grant.

Webb v.  
Bird.

In *Webb v. Bird* (*j*), it was maintained, in accordance with the judgment in *Chasemore v. Richards* (*k*), that the prescription of a grant from long continued enjoyment only arises when the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the proposed grant. In the case of *Blackett v. Bradley* (*l*), the law alleged, first, a prescriptive right, to search for, win, and work coal mines lying under a common, without leaving any support to the surface, or making or paying any satisfaction for any injury that might be caused by such working; and secondly, that the right had been exercised more than 40 years; but it was decided, on the authority of *Hilton v. Lord Granville*, that such a prescriptive right was bad on the face of it, at the same time it was admitted, that although to some extent the reasoning of the court in the latter case had been impugned, the decision had not been overruled.

Proof of  
prescription and  
custom.

Formerly legal proof both of a prescription and custom was required from the time "whereof the memory of man runneth not to the contrary." This period was limited to the beginning of the reign of Richard I.; and, although it was not necessary to prove the usage from that period, yet it was sufficient to invalidate the title if the usage was proved to have commenced since that period (*m*). It was, therefore, considered necessary to make some provision by virtue of which a title gained by prescription or custom could not be disputed after a certain defined period, and, accordingly, an Act of Parliament, 2 & 3 Will. IV. c. 71, was passed, entitled "An Act for shortening the Time of Prescription in certain Cases." The Act enacts, "That no claim which might be lawfully made at the common

2 & 3 Will.  
IV. c. 71.

(*j*) 8 Jur. N.S. 621.

(*k*) 29 L.J. Ex. 81; 7 H.L. Ca. 749.

(*l*) 8 Jur. N.S. 588.

(*m*) Litt. 170; Co. Litt. 115<sup>a</sup>;  
Mayor of Hull v. Horner, Cowp. 109;  
Jenkins v. Harvey, 1 Cro. M. & R.

877; Rex v. Joliffe, 2 B. & C. 54; 3  
D. & R. 240; Curtis v. Daniel, 10  
East, 273; Doe d. Fenwick v. Reed,  
5 B. & Ald. 232; Codling v. Johnson,  
9 B. & C. 933; Penwarden v. Ching,  
Moo. & M. 400.



law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land, except such matters and things as are therein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of 30 years, be defeated or destroyed by showing only that such right, profit, or benefit, was first taken or enjoyed at any time prior to such period of 30 years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit, shall have been so taken and enjoyed as aforesaid for the full period of 60 years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing" (n). Profits  
prendre,  
when not  
to be de-  
feated.

"That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water, when such right shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years, shall be defeated or destroyed by showing only that such right was first enjoyed at any time prior to such period of 20 years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such right shall have been so enjoyed as aforesaid for the full period of 40 years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing" (o). Easements.

"Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be

brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made (*p*).

“That in the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim (*q*).

What time  
to be ex-  
cluded.

“That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible (*r*).

“That when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of 40 years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof (*s*).

(*p*) Sec. 5.

(*q*) Sec. 6.

(*r*) Sec. 7.

(*s*) Sec. 8.

“That in all actions upon the case and other pleadings, Pleadings. wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this Act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation” (*t*).

The Act was not to extend to Scotland or Ireland (*u*); but by 21 & 22 Vic. c. 42, the provisions of the said Act were from and after the 1st day of January, 1859, to extend and apply to Ireland.

The Prescription Act was intended to prevent old rights from being defeated by proof that they could not by possibility have existed at the period of legal memory (*v*), and since the Act, the enjoyment of the right need now only be proved for the period specified in the Act according to the nature of the claim. The alleged right must not have been broken by any adverse act on the part of the claimant (*w*);

General  
effect of  
Prescrip-  
tion Act.

(*t*) Sec. 5.

(*u*) Sec. 9.

(*v*) Per Martin, B., in *Natural G.*

*M. Co. v. Donald*, 4 H. & N. 8, Wilson  
*v. Stanley*, 12 Ir. C.L. 350.

(*w*) *Bailey v. Appleyard*, 8 Ad. &



and where there is legal possession or enjoyment of the right, although no actual possession, there can be no adverse possession; if therefore it is intended to rely upon interruption of the right, some actual obstruction to its enjoyment must be shown—payment of rent, or a deviation from the right as in the case of ways if duly authorized, is not sufficient (*x*). To establish a right under the Act there must be an abandonment of possession by one person followed by the actual and continued possession of another person for the period specified in the Act (*y*), and as an interruption to be effectual must have been acquiesced in for one year, quiet enjoyment of the right for nineteen years and a small part of another year will establish a right (*z*). But evidence of interruption for any period, however short, may be given to show either that there never was a right or in proof of a parol license (*a*). Whether there has been an interruption of the right is a question for the jury (*b*). In pleading a title under the above Act 2 & 3 Will. IV. c. 71, it is not sufficient to aver the enjoyment for twenty years, but it must also be alleged to have been done “as of right” (*c*). A prescription to enter and dig for minerals, paying reasonable compensation for surface damage, is an entire prescription, and will not support the affirmative of an issue taken upon a plea justifying under a prescriptive right to enter and dig for minerals if the qualification for making compensation be omitted (*d*). Whenever the validity of a prescription or

Entire  
prescrip-  
tion.

EH. 167; *Wright v. Williams*, 1 M. & W. 77; *Lowe v. Carpenter*, 20 L.J. Ex. 374; *Carr v. Foster*, 3 Q.B. 581; *Payne v. Shedden*, 1 M. & Rob. 382, cited 3 Q.B. 583; *Monmouthsb. Canal Co. v. Harford*, 1 Cro. M. & R. 614; *Tickle v. Brown*, 4 Ad. & E. 383; *Beasley v. Clarke*, 2 Bing. N.C. 705.  
(*x*) *Reg. v. Chorley*, 12 Q.B. 515; *Hall v. Swift*, 6 Scott, 167; *Blanchard v. Bridges*, 4 Ad. & Ell. 176.

(*y*) *M'Donnell v. M'Kinty*, 10 Ir. L. Rep. 525; *Smith v. Lloyd*, 9 Ex. 562; ante, pp. 154-156.

(*z*) *Flight v. Thomas*, 8 Cl. & F. 242, 11 Ad. & Ell. 695; *Parker v. Mitchell*, 11 Ad. & Ell. 788; *Cooper & Hubbuck*, 6 L.T. N.S. 826.

(*a*) *Eaton v. Swansea Waterworks Co.* 20 L.J. Q.B. 482; *Plasterers' Co. v. Parish Clerks' Co.* 20 L.J. Ex. 362.

(*b*) *Carr v. Foster*, 3 Q.B. 581; *Battishill v. Reed*, 18 Com. B. 696.

(*c*) *Holford v. Hankinson*, 5 Q.B. 584; *Onley v. Gardiner*, 4 M. & W. 496; *Beasley v. Clarke*, 2 Bing. N.C. 705; *Tickle v. Brown*, 4 Ad. & Ell. 369; *Solomon's case*, 4 H. & N. 585; *Livett v. Wilson*, 3 Bing. 115; *Rogers v. Taylor*, 26 L.J. Ex. 203; s.c. 1 H. & N. 706.

(*d*) *Paddock v. Forrester*, 11 L.J. C.P. 107; s.c. 3 Man. & G. 903.

custom has been established at law or in equity, the judgment or verdict at law, or the decree in equity, may be given in evidence in any proceedings brought by others claiming under the same right, but the verdict of a jury is not always conclusive (*e*). And depositions used in a suit, whether in reference to the same custom or not, may also be given in evidence upon a trial of any other disputed question (*f*).

The Prescription Act has lately been reviewed in the case of *Wilson v. Stanley* (*g*). The facts of the case were these: A lease made in 1775 by A. to T. comprised two closes, Blackacre and Whiteacre. A mill was subsequently built on Blackacre, which was supplied by a stream through Whiteacre, and S., a tenant of the mill under T. and subsequent tenants, enjoyed the right of water from 1818. In 1836, C., who was entitled to the reversion expectant on T.'s lease, appointed Whiteacre to K. for life, retaining Blackacre. The lease of 1775 expired on the 26th April, 1840. K. in 1841 demised Whiteacre to the defendant, and in 1843 C. demised Blackacre to the plaintiff, with the right to water sufficient for the mill as enjoyed by S. In an action for the diversion of the water, it was held that as during the lease of 1775 there was a unity of possession in T., the enjoyment by S., his tenant pending that lease, was not an enjoyment "as of right" within the meaning of the Prescription Act, and it was also held that the user for more than twenty years since the 26th April, 1840, conferred no title to the easement under the 2nd section of the Prescription Act, the reversion of the servient tenement during the period being vested in K., the tenant for life.

(*e*) *Reed v. Jackson*, 1 East, 357; (*f*) *Nichols v. Parker*, 14 East, 331; *Weeks v. Sparke*, 1 M. & Sel. Bull. N.P. 233; *Biddulph v. Ather*, 2 Wils. 23; *Brown v. Rawlins*, 7 East, 429. 486.

(*g*) 12 Ir. C.L. 345.

## CHAPTER XVI.

## LOCAL LAWS AND CUSTOMS.

Requisites  
of a legal  
custom.

IN discussing local customs, it will be well to remember the requisites of a legal custom, as pointed out in the last chapter; and further, that it is incumbent upon the person alleging a custom to prove it, as the court will not take judicial notice of any alleged custom without proof (a). Subject to these observations, we proceed to consider the local laws and customs of:

1. CORNWALL AND DEVON.
2. SOMERSET.
3. DERBYSHIRE.
4. GLOUCESTERSHIRE.
5. THE COAL AND IRON DISTRICTS.

## CORNWALL AND DEVON.

*Antiquity of Customs—confirmation by the Stannary Parliaments.  
Statutory recognition.*

Antiquity  
of cus-  
toms.

THE mining customs of Cornwall and Devon are of great antiquity (b). Those of Cornwall were defined at the Convocations or Parliaments of Tinnars held in the reigns of Elizabeth, James I., Charles I., Charles II., James II., and Anne, and were mostly confirmed at a convocation held in the twenty-seventh year of the reign of George

(a) Fenn's case, 4 De G. M. & G. 285; Bodmin United Mines, 26 L.J. Ch. 573; Hawkin's case, 2 K. & J. 253.  
(b) Polwhale's Hist. of Devon, ib. Cornwall, vol. i. p. 37, edit. 1797; ante, pp. 72, 75-87.



II. (c). Those of Devon were defined at convocations held in the reigns of Henry VIII., Edward VI., and Elizabeth (d). The convocation for Cornwall, held in the second year of James II., declared as follows: "We likewise find that the tinnerns in Cornwall have time out of mind had and enjoyed divers and sundry liberties and privileges, which Edward the First by his charter under the great seal of England, dated at Westminster the tenth of April, in the thirty-third year of his reign, did confirm, and granted some new privileges, as by that charter allowed in Parliament in the five and thirtieth year of the reign of Edward the First, and was again confirmed in the first year of Edward the Third, and the seventeenth of Edward the Third, it doth and may appear. And we further find an exposition of the said charter of the three and thirtieth of Edward the First, that was made in the Parliament holden in the fiftieth year of Edward the Third, which said charter was likewise confirmed in the fifth year of the reign of Richard the Second, in the third year of Edward the Fourth, in the first year of Edward the Sixth, in the first and second years of Philip and Mary, and the second year of Queen Elizabeth. And we likewise find that King Henry the Seventh granted a charter of pardon, with a new grant and declaration of liberties and privileges to the tinnerns of Cornwall in the three and twentieth year of his reign, which said charter was also confirmed in the twelfth year of the reign of Queen Elizabeth. We find likewise, that several Convocations or Parliaments of Tinnerns have been from time to time held, but in the late horrid rebellion against our late sovereign lord King Charles the First, of ever blessed and glorious memory, in the year 1644, the rebels under the command of the Earl of Essex, the prince's exchequer at Lostwythiel was plundered, and most of the records destroyed. But we find that at a Convocation or Parliament of Tinnerns held at Lostwythiel the eight and twentieth day of September, in the two and twentieth year of King James the First, before the Right Honourable

Confirmation  
of  
Cornish  
customs.

(c) Pearce's Stan.; Stan. Laws; Sir Geo. Harrison's Rep. p. 11.

(d) Act 5 Convoc. 30 Eliz.; Hale's MSS. (Lin. Inn), vol. lxxxiii. p. 235.

William Earl of Pembroke, then Lord-Warden of the Stannaries, there were several laws and constitutions made in affirmation of our customs. We find further, that at another Convocation or Parliament of Tinnners held at Lostwythiel aforesaid, the twelfth day of August in the eleventh year of the reign of our said late sovereign lord King Charles the First, before the Right Honourable Philip Earl of Pembroke and Montgomery, then Lord-Warden of the Stannaries of Devon and Cornwall, there were several laws and constitutions made in affirmation of our customs. And we do allow, ratify, and confirm, all the ordinances and declarations made, declared, and ordained, in and by the several Acts and constitutions of Convocation not altered, abridged, or made void by Act of Parliament, or by the constitutions hereinafter made and ordained. And we do likewise approve and confirm all our antient and laudable customs relating to the properties and privileges of the tinnners. And for further declaration of our customs and laws, and the ordering and settling such matters as we think fit and necessary upon mature consideration, to be altered, ordained, and settled for the better government of the Stannaries of Cornwall, and the good and benefit of the tinnners therein, according to His Majesty's said gracious commission, granted and signified to the Right Honourable the Lord-Warden for the settlement of the Stannaries of Cornwall, and the redress of all the abuses and grievances therein."

Statutory  
recogni-  
tion.

In each county, since the last Tinnners' Parliament, other usages have been claimed, and in some instances received the sanction of the superior courts. On the passing of the 6 & 7 Will. IV. c. 106, it was declared (sec. 43), that such of the customs of the Stannaries of Cornwall as were not repugnant to the law of the land, or annulled, repealed, or altered by that statute, were to remain in full force; but no such enactment has been passed in reference to the customs of Devon. The Cornish customs may, therefore, be said to have received a statutory recognition, whilst those of Devon have not. But what the customs of each county

are, can only be ascertained by reference to the proceedings at the Convocations or Parliaments of the Tinnars, and the subsequent entries on the file of proceedings in the Stannaries Court, as neither the above-mentioned statute of William IV., nor any subsequent statute, has defined or specified them except indirectly in one or two instances in the Acts for the amendment of the Stannaries Court jurisdiction. In this work we shall limit our inquiries to the following customs :

1. THE RIGHT TO CUT ADITS THROUGH THE LANDS OF OTHERS.
2. THE RIGHT TO THE USE OF, AND TO DIVERT AND FOUL WATER, FOR TIN-BOUNDS, IF NOT, FOR MINES IN GENERAL.
3. THE RIGHT TO FORFEIT A CUSTOMARY SET FOR NON-WORKING OR IMPROPER WORKING.
4. TIN-BOUNDING.
5. THE SEVERAL CUSTOMARY LAWS OF THE COST-BOOK SYSTEM.

The following is a copy of the alleged custom to cut an adit through the lands of another, as presented to the Convocation or Parliament of Tinnars, in the reign of Charles I.: " We present and affirm our custom to be, that a tinner may bring an addit through any other men's bounds in wastrel without leave, through which addit he is to have a passage only for his water; but if he shall break tin, or discover a load in his drift, or sinking of day shafts, he is to have no benefit of the said tin or load, but shall leave it wholly to the owners of the bounds in which it is. And we further present and say, that we have not any custom or precedent to warrant a tinner to bring an addit to his work through other men's several lands, nor to avoid his water through another man's addit, without license of the owner of the several lands, or of the addit, first had and obtained, and composition made with them for the same" (e). The above alleged custom has never been

Right to  
cut adits.

(e) Convoc. 11 Chas. I. § 28; Stannary Laws, p. 49.



established by any decision of a court of competent jurisdiction, and must therefore be constructed most strictly.

Use of,  
diverting,  
and foul-  
ing water.

The right to the use of and to divert and foul water and water-courses (*f*) for the purposes of mining is affirmed in the charters of John, and Edward (*g*), but it may be doubted whether such right is not confined to tin-bounds only, and not to mines in general. The custom in Devon has been disputed (*h*). But if, and whenever, and wherever, the custom is claimed, care must be taken not to damage the soil of private owners, or to pollute or damage fresh water, or to divert water, which can be claimed by prescription, or by higher title than that relied upon by the tinner. The general law of the land will be brought to bear upon all such questions; and by two statutes (*i*) it was enacted, that no person should work or labour in any, or any manner of, tin-works, called stream-works, within the county of Cornwall nigh to any of the fresh waters, rivers, or low places descending or having course into the havens or ports of Plymouth, Dartmouth, Tinmouth, Falmouth, and Fowey, in the counties of Cornwall and Devon, nor any of them, nor should labour, dig, or work any tin in any of the said tin-works, called stream-works, unless the digger, owner, or washer should make or cause to be made "sufficient hatches and ties in the end of their buddels and cords" (*j*).

The above statutes were rehearsed at a convocation of the tanners, held in the thirty-first year of the reign of Elizabeth; and at the convocation of tanners held in the twenty-sixth year of George II. the custom was re-enacted as follows: "Whereas, streaming tanners under a pretence that they have a right by virtue of the charter to turn water and water-courses, where and as often as need shall require for the working and searching of tin, and thereby disturb and spoil pot-waters running to men's

(*f*) Post, title "Water-courses."

(*g*) Ante, p. 76; Pearce's Stan. p. 3.

(*h*) *Bastard v. Smith*, 2 M. & Rob. 129.

(*i*) 23 Hen. VIII. c. 8; 27 Hen. VIII. c. 28; Pearce's Stan. pp. 154-161.

(*j*) Pearce's Stan. p. 157.

houses, and also divert water from ancient mills, and likewise disturb and spoil running waters out of malice, contrary to the true intent and meaning of the said charter, as appears by the exposition thereof in Parliament. Be it therefore declared and enacted, that no person shall under any pretence whatsoever, spoil or divert any pot-waters running to any man's house for dressing of meat, or for the service of his family, nor divert any water from any ancient mill. And whoever is guilty of such offence, shall forfeit and pay such damages as the owner of the house or mill has received thereby, to be recovered by action in the court of the Stannary wherein the offence is committed. And be it further enacted, that if any person or persons shall disturb or spoil any running water out of malice, and be convicted thereof, by indictment at the law court, he shall forfeit the sum of five pounds to the use of the king, or Lord Duke of Cornwall."

Diverting  
and fouling  
water.

"Item. Whereas, great prejudice hath arisen to the rivers, and likewise to the lands adjoining to, or below, stream works, by the streamers working their stream works, and letting the gravel or rubble digged by them in their searching for finding and working their tin, either fall into the rivers, or be washed upon the land adjoining to, or below them. In order to remedy such inconvenience, be it declared and enacted, that where any moors, meadows, or pasture ground shall be overflown by streamers suffering their stones, rubble, and gravel to fall into rivers, if such streamer, or streamers, shall not upon two days' notice given to him or them, clear the said river, so as to prevent such moors, meadows, and pasture ground from being overflown, such streamer, or streamers, so offending, shall forfeit such damages and costs to the party aggrieved as he shall sustain thereby; and also forfeit the sum of five pounds, one moiety to the king or Lord Duke of Cornwall, and the other moiety to the person suing for the same, to be recovered by plaint or information in the court of the Stannary wherein the offence is committed" (*k*).

This custom has not been established in any court of law

(*k*) Stany. Laws, p. 112.

or equity of competent jurisdiction; and practically it cannot be relied upon, except as against the crown. Subject, however, to any customary right the common law of the land must prevail (*l*).

Forfeiture  
of custo-  
mary sets.

The grantor of a customary set may re-enter and declare forfeited any set granted by him which is not duly worked. The following is the law of the tinners: "Whereas, doubts have arisen concerning the forfeiture of customary sets of mines by not working the same; and whereas a notion has arisen that such customary sets may be preserved, although such mines are not effectually wrought; be it therefore declared and enacted, that if any person or persons shall take such customary set, and shall not work the same effectually at all working times and seasons, or shall leave the said work unwrought at any time, without reasonable cause, it shall and may be lawful for the person or persons so setting the said mine, to enter into, have again, repossess and enjoy the same in the same manner as if no such set had ever been made or granted" (*m*). This custom is of little practical value, as all sets, it is believed, are now in writing, but if any such customary sets do exist, the Stannary Court, it is said, will enforce such forfeiture, at least since the writ of ejectment was introduced by 18 Vic. c. 32, s. 15.

(*l*) Post, title, "Streams and Water-courses."

(*m*) Convoc. of Tinners, 27 Geo. II.; Stann. Laws, p. 114.



TIN-BOUNDING.

**CORNWALL.**—*Antiquity of custom proved from the charter of John—Pearce's, and Smirke's Stannary Laws—Convocations or Parliaments of the Tinnars—James I.—Charles I.—James II.—26 & 27 Geo. II.—Court Rolls of the Stannaries. Description of the custom in Rowe v. Brenton—Rogers v. Brenton. Custom referred to in 6 & 7 Will. IV. c. 106, ss. 41, 43; 7 & 8 Vic. c. 105, ss. 32, 84; 18 Vic. c. 32. s. 17. Decisions on the custom—Crease v. Barrett—Doe d. Earl of Yarmouth—tin only subject to the custom—immemorial bounds—renewing and preservation of bounds—Vice v. Thomas—Rogers v. Brenton, Stannary laws, ministers' accounts used in evidence, Lord Denman's judgment—Smirke's opinion—Attorney-General v. Mathias—Constable v. Nicholson. The author's deductions from the authorities respecting the custom.*  
**DEVONSHIRE.**—*Custom in Devon resembles the Cornish custom—points of difference—real estate—tolls to the Lord.*

THE earliest reliable proof of the ancient custom of "tin-bounding" is the charter of King John, granted by that monarch in the third year of his reign to the tinnars of Cornwall and Devon. The following is an extract from that charter:

Charter of John.

"Quod possint (stannatores nostri) omni tempore libere et quiete absque alicujus hominis vexatione fodere stannum, et turbas ad stannum fundendum ubique in moris et in Feodis Episcoporum, et Abbatum et Comitum, *sicut solebant et consueverunt*, et emerè buscam ad funturam stanni sine vasto in regardis forestarum, et divertere aquas ad operationem eorum in stammariis sicut de antiquâ consuetudine consueverunt."

Some particulars of the custom in the reign of Henry VIII. and Queen Elizabeth will be found in Pearce's Stannary Laws, respecting which, inter alia, the following matters are referred to:

Pearce's Laws.

1. The manner of bounding tin-works.
2. Whether if a tinner missing the day for renewing his bounds can afterwards renew them before any other tinner claims them.
3. Of two divers bounds on one tin-work. The title to the respective claimants was tried in 1586 at the Stannary Court of Blackmore.
4. How long a man may keep his work without delivery of toll-tin.

5. If freehold is pleaded to an action, can the steward try the cause?

6. If a man dies possessed of a tin-work or tin-bounds, does it belong to his executors, or to his heirs (*n*)?

Smirke's  
Stannary  
Laws.

In Mr. Smirke's work will be found :

1. Presentment of the custom by the tinnerns of the Stannary of Tywarnhaile, in the 2nd year of Jas. I. A.D. 1604.

2. Presentment of the custom by the tinnerns of Blackmore, in the 7th year of Jas. I. A.D. 1609, where bounds are worked by one of several owners.

3. Presentment of the custom by the tinnerns of the Stannary of Foweymore, in the 11th year of Jas. I. A.D. 1613.

4. Presentment of the custom by the tinnerns of the Stannary of Penwith and Kerrier, in the 14th year of Jas. I. A.D. 1616 (*o*).

5. Extract from the Court Rolls of the Stannary of Foweymore, wherein entries of bounds occur (*p*).

6. Writ of possession of the bounds after the 3rd proclamation, A.D. 1725 (*q*).

7. The Vice-Warden's judgment in the case of Vice v. Thomas—counsel's argument on appeal—and the Lord Warden's judgment delivered in 1842 (*r*).

Laws of the  
Tinnerns  
in Corn-  
wall.

Like all customs within the Stannaries, Tin-bounding formed one of the subjects which was defined in the different Convocations or Parliaments of the Tinnerns; and at the last Parliament for Cornwall, which was held in the 26th and 27th years of the reign of Geo. II. A.D. 1752-3, by virtue of a Commission of the King under his Privy Seal to the Lord Warden for that purpose directed, the following laws (among others) which had been previously made for that county were re-enacted and confirmed :

Laws of the  
Stannary  
Parlia-  
ment,  
22 James I.

“ 17. We find, according to our ancient customs, that any tinner, that shall new cut any old bounds, shall at the

(*n*) Pearce's Stan. Intro. 13-22.

(*o*) Smirke's Stan. App. 58-61.

(*p*) Ib. 73.

(*q*) Ib. 77.

(*r*) Ib. 12, 17, 26, 32-36.

next court within the Stannary where the work is, enter his proclamation (s) for the same, and therein nominate all his owners, and the day of his pitch, and the names both old and new of the said work, with the bounds and limits of the said pitch, otherwise the said pitch to be deemed void.”

Proclama-  
tions.

“18. We find when bounds are kept by renewing according to the custom, and the keeper shall carelessly let slip his day of renewing, and shall afterwards come again, and renew the old corners, before any other tinner shall cut a new pitch upon them, that such renewing shall be taken for a good renewing against any other pitch.”

Renewing  
bounds.

And at the said Stannary Parliament, held in the 26th and 27th years of Geo. II., the following laws among others which had been made in the 11th and 12th years of Chas. I. were re-enacted and confirmed :

Laws of the  
Stannary  
Parlia-  
ment,  
11 & 12  
Charles I.

“3. We present and affirm, that by common prescribed Stannary right, any tinner may bound any wastrel lands within the county of Cornwall that is unbounded, or void of lawful bounds; and also any several and enclosed land that hath been anciently bounded and assured for wastrel, by delivering of toll-tin to the lord of the soil before that the hedges were made upon it; and also such and so much of the prince's several and enclosed customary land within the ancient duchy assessionable manors, as hath been anciently bounded with turfs, according to the ancient custom and usage within the said several duchy manors, and not otherwise, the tinner paying out of such land so bounded the usual toll only as is generally paid within the Stannaries, that is the fifteenth dish or part, saving in such places where a special custom hath limited another rate of toll.”

Wastrel.

Prince's  
lands.

“4. We present and affirm our general custom of gaining and keeping right in bounds to be by new pitch and renew, in such manner as it now is, and anciently hath been in use in the several Stannaries; which said general custom we limit, ordain, and agree that it shall be thus understood, viz. That an owner working his tin-work by himself, his wages-man, or farmer, paying toll once a year and a day, or otherwise continuing his working without

(s) Post, p. 353, 360, 366, 368.



Laws of the  
Stannary  
Parliament,  
11 & 12  
Charles I.

fraud in driving an adit unto, or sinking a shaft upon the said work, and withal preserving the four corner bounds, so as they be seen or sufficiently proved, if they, or any of them shall be newly or casually or maliciously defaced, so long the said owner shall not lose his bounds for default of renewing."

Proclamations.

"15. We agree, constitute, and ordain that whosoever shall pitch any bounds, shall enter his proclamation for the same in the Stannary Court, where the ground lieth, at the first court that shall be holden after the said pitch; in which proclamation he shall set down the day of the pitch, the names of his fellow-owners, the name of the said work, and the old name also, together with the place where the bounds lie, or otherwise the pitch to be void."

Partners.

"16. We agree, constitute, and ordain that where there are many co-partners in a tin-work, such owners as, upon the reasonable warning given them, shall not either set their parts to farm, or bring in their men or money according to their parts, within one month after the work shall be set to work, paying cost and spale for that month, such owners shall be excluded from entering or adventuring in the said work during that adventure, and shall have only such farm as the work is set for by the rest of the owners; and in case of non-entry upon reasonable warning, if it be a work of charge and not of present profit, a set made by most part of the owners of the tin-work by our custom is, and shall be good and available against the rest of the co-partners. And in case where none of the owners have made any set, but all of them either adventure or forbear entry, there the farm shall be assessed by the oaths of three indifferent tinnors that are to be chosen, one by the workers, one by the owners not adventuring, and the third by the steward of the Stannary Court where the work lieth." (The same law was enacted in the Stannary Parliament, 22nd Jas. I.) (*t*).

"17. We present and affirm our custom to be, that neither Vice-Warden, steward, bailiff, lawyer, attorney, nor any other officer or practiser in the Stannary jurisdic-

tion, nor any great person in the county, nor any man of power among tin-works, nor their children, clerks, servants or friends in trust for them, directly or indirectly, ought to be made owners in any tin-works in variance, and for that rights in tin-works are many times overborne by countenance, We further agree, constitute, and ordain that what tinner soever shall give, sell, or promise, directly or indirectly, any tin-works, or bounds in variance, or any part thereof to any the persons aforesaid, or in trust for them as aforesaid, shall forfeit £5, and that the gift, sale, promise, or disposition, shall be deemed to be void in regard to him to whom it is made; and that the right or part so given or sold, promised, or disposed, shall enure to the churchwardens of the parish where the work lieth, for the time being, and their successors, towards the relief of the poor of the said parish." (The same law was enacted in the Stannary Parliament, 22nd Jas. I.) (*u*).

Laws of the  
Stannary  
Parlia-  
ment,  
11 & 12  
Charles I.

"18. We present and affirm our custom to be, that whatsoever tinner hath been in quiet possession of a tin-work by the space of a year and a day, by himself, his farmers, or workers, he ought not to be removed from the possession, or dispossessed of his farm-tin by any command, order, sequestration, injunction, or other writ whatsoever, before that verdict shall be against him for the right of the tin-work. And in case, where neither party hath been in possession of quiet working a year and a day, but that the variance is about old right and new pitch, We agree, constitute, and ordain that the workers that were first in, and discovered the right, shall not be molested, but shall continue their possession until verdict shall be against them upon the title; but the farm, in the interim, shall be sequestered and deposited in mesne hands, to answer to him that shall recover by legal trial." (The same law was enacted in the Stannary Parliament, 22nd Jas. I.) (*v*).

"19. We agree, constitute, and ordain that if any owner, partner, or keeper of bounds for other men, shall suffer the said bounds to be unrenewed, and so become void, and shall not first declare and give reasonable warning unto the rest

Bounds un-  
renewed.

(*u*) Stannary Laws, p. 21.

(*v*) Stannary Laws, p. 22.

Laws of the  
Stannary  
Parlia-  
ment,  
11 & 12  
Charles I.

of the owners, that he no longer will be keeper of them, willing them to look to the keeping of them, and offer himself ready to show them the four corners, in that case, the new pitch shall enure, by way of remitter, to the behoof of the old owners, saving to such of them as were party or privy to the fraud, whose right shall accrue and be to the rest of the old owners. And the keeper and every one, that shall be party or privy to the fraud, being thereof legally convicted by verdict, shall forfeit and incur the penalty of £20, the one-half to the lord-prince, and the other half to the party or parties grieved." (The same law was enacted in the Stannary Parliament, 22nd Jas. I.) (*w*).

"31. We agree, constitute, and ordain that if any tin-works under bounds hath lain, or shall lie unwrought by the space of seven years, and if any tinner shall be desirous to work the same, he shall signify such his purpose to the owners of the said work, or to the most of them, and shall cause to be entered of record upon the court-book the place where the said work lieth, and the time of such his declaration, to whom and before whom, and then if the owners of the said work, or some of them, shall not work, set, or procure the said work to be wrought within one year next after such declaration made unto them, if the owners have not any other work then in working by their own adventure, it shall be lawful for the said person that gave such warning to the owners to work the said work at farm, as long as he will continue his costs therein, paying to the owner, if it be dry work, the seventh dish to farm; and if it be a water-work, that draweth water both summer and winter, but the ninth dish to farm. Provided that before he enter into the work, he shall give sufficient caution, such as the steward of the Stannary Court shall allow, for the well and orderly working and preservation of the said work; and that he shall not break the pillars, backs, vaults, or binding thereof, nor fill the addit thereof to the prejudice or destruction of the said work. But for tin-works in several lands unbounded, which belong to the lords of the soil only; we affirm and say, that by our custom no tinner may work in several or



unbounded lands without the leave of the lord or owner of the soil."

And at the said Stannary Parliament of 26 & 27 Geo. II., the following laws which had been made at the Stannary Parliament held in 2nd year of James II. were recited and confirmed :

"*Imprimis.* We agree, constitute, and ordain that whosoever shall pitch any bounds shall enter his proclamation of the same in the Stannary-court where the ground lieth at the first court that shall be holden after the said pitch, in which proclamation he shall put down the day of the pitch, the name of his fellow-owners, and of the party that cut them, and the true bounds and limits of the corners thereof, otherwise the said pitch to be void. And also that when any pitch of new bounds shall be entered in the Stannary-court, the same shall be openly proclaimed (*x*) at that court and two courts following, before writs of possessions shall be granted, and shall be engrossed and posted up in some open place in the court, during the continuance of such three courts before a writ of possession. And if any person shall in any of the said three courts make claim or title against the said new pitch, either by reason of old bounds, or several lands, he shall forthwith enter his action of trespass against the person that cut the said bounds, and the persons to whose use the same were cut. And the person so cutting shall likewise give notice in writing of such pitch, to the lord or lords of the fee of the lands on which such bounds were cut, or to some or one of his or their stewards, agents, or servants within one year next after such pitch, and shall prove such notice given before the steward of the Stannary in which the bounds are, within twelve months next after such notice given, otherwise the pitch to be void."

Laws of the  
Stannary  
Parliament,  
2 James II.

Proclamations.

"2. *Item.* We present our ancient custom to be, and do agree, constitute, and ordain that all tin-bounds ought to have four corners (*y*), which shall consist of twenty-four turfs or stones, six to each corner. And we likewise find, that side-bounds have been anciently used, and are still lawful to be used. And we do declare our custom to be, that all

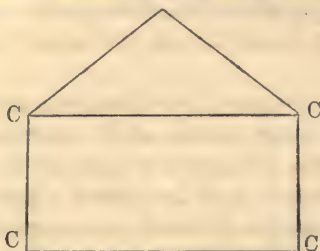
Description of tin-bounds.

(*x*) Post, p. 368.

(*y*) See figure, next page.

Laws of the  
Stannary  
Parlia-  
ment,  
2 James II.

bounds must be renewed within a year and a day, and that side-bounds shall likewise be so renewed whereof the benefit shall be claimed. And we do further declare our custom



to be, that in case the side-bounds be unrenewed and left void, and the head or corner-bounds be renewed, the benefit of the side-bounds only shall be lost, as to the land that they draw, but the land within the head or corner bounds shall remain well bounded."

"3. *Item.* We do agree, constitute, and ordain, if the lord of the soil where land-dole is customary do take and receive his toll-tin before he enter his land-dole, then the lord of the soil is, and shall be barred of his land-dole; but if he enter into his land-dole before he take his toll-tin, then he shall have, possess, and enjoy, both land-dole and toll-tin, else he shall have the toll-tin only."

"4. *Item.* We do agree our custom to be, and accordingly constitute and ordain that rights and titles to bounds, and rights and titles to adventures to work for tin shall be in the owners, in the nature of chattels real; but shall be perpetually enjoyed from executor to executor, or administrator, being renewed and continued according to custom, and shall be executory assets subject to the payment of debts and legacies, in such order and manner as other goods and chattels are by the rule of the common law, but may be granted by deed or devised by will."

"8. *Item.* We do agree, constitute, and ordain that where any tinner shall work either in wastrel or several, and shall make and break tin under ground, and the party or parties, who have either bounds or several lands contiguous, or near adjoining with the said bounds or several lands, wherein

such tin is made or wrought, that in case such owner of the several lands or bounds, so contiguous or adjoining, shall suspect that the party so digging is come into the bounds or several under ground, and hath wrought tin there, the owner of the lands or bounds so adjoining complaining thereof unto the steward of the Stannaries, Vice-Warden, or Lord Warden, or either of them, that then it shall and may be lawful for the steward of the Stannaries, Vice-Warden, or Lord Warden, or any of them, upon such complaint made unto them or either of them in that behalf, to nominate and appoint three sufficient indifferent persons for to enter upon, and go down by the benefit or use of the present tackle or ropes into such work then used, and into all and every shaft and shafts so near adjoining, which hath or shall be so digged or wrought in; and to see and try by measuring or otherwise, whether there be any digging within the limits of their lands or bounds, to view the same under ground. And in case the party so working shall not after such view to be had as aforesaid, and notice thereupon given, desist to work any further within such lands or bounds, that then the owner or owners of such adjoining lands or bounds, or such as claim under them, shall dig shafts for the working of the said tin, and bringing up the same to grass, and shall and may bring their action of trespass against the owner or adventurer that hath so wrought tin under ground within their lands or bounds, and recover the full value of all the tin stuffs, and tin-*oar*, so wrought within the limits of the said adjoining bounds, or several lands, after the time of such view and notice given, together with the costs of suit, in case such tin shall appear to be wrought within such adjoining bounds or lands. But if the party shall desist such working, upon such view and notice given; that then the party so working shall not be liable to any action, for what he hath digged or wrought before such notice given. And we do lastly ordain, that as often as any trial shall be had touching any digging under ground beyond the lands or bounds, it shall be by a special court if required by either party so contending as aforesaid; and the jury to try the said cause shall

Laws of the  
Stannary  
Parliament,  
2 James II.



Laws of the  
Stannary  
Parlia-  
ment,  
2 James II. come upon the said place, and go down into such shafts to view and measure the same. And likewise view and measure the extent of the lands or bounds upon the surface, for their satisfaction, and the extent of such lands or bounds shall then be shown unto them. But this law shall not extend to any working under ground in the drift of any audit through any wastrel lands."

Laws of the  
Stannary  
Parlia-  
ment,  
26 & 27  
Geo. II. And at the Stannary Parliaments held in the 26th and 27th years of the reign of George II., various other alleged customary rights of the tanners were confirmed. Many of those rights were mere recitals of existing customs, whilst others were not so; the former must therefore be considered as of greater force than the latter. The following are, *inter alia*, the laws referred to:

Wastrel  
lands. "8. *Item*. Whereas by the common usage and custom of the Stannaries, any tinner may bound with tin-bounds any wastrel lands within the county of Cornwall, that are unbounded or void of lawful bounds; and also any several and enclosed lands that have been anciently bounded and assured for wastrel by payment of the toll-tin before that the hedges were made upon the same; and also may cut bounds in the Prince's several and enclosed ancient assessionable duchy manors, according to the ancient custom and usage within the said several duchy manors, the tanners so bounding the said lands, paying the usual toll to the lord of the soil, as is generally paid within the Stannaries (that is to say), a fifteenth dish or part, saving in such places where a special custom hath limited another manner of toll; and whereas there are several ancient and laudable customs relating to the manner of cutting, renewing, and working of tin-bounds; be it hereby declared and enacted, that all such customs shall remain and be in force, unless they are hereinafter particularly limited and restrained; but whereas there are several frauds committed by part-owners in tin-bounds, and the keepers of bounds, in not renewing the same, but suffering them to remain unrenewed, with an intent that the same may be forfeited and lost, and then be cut again to his or their own use or uses, either in his or their own name or names, or in the names of others in trust for him or them,

Toll to the  
lord one-  
fifteenth,  
or what is  
customary.

or some other person by their direction; and whereas several laws have been made in order to prevent such undue practices, which laws may be of use to be enforced; be it therefore declared and enacted, that where there are divers owners of, or part-owners in one pair of tin-bounds, if any such owner or partner shall suffer such bounds to become void with an intent to defraud his partners, and afterwards procure or suffer the said bounds to be new cut, either in his own name, or in the name or names of any other or others in trust for him, or some other person or persons by his direction, the bounds so new cut, shall be to the use of the other owners and partners so intended to be defrauded; and the owner or partners so intending to defraud the other owners, shall forfeit and lose his part to the other owners or partners, to be by him or them enjoyed in such shares as shall be in proportion to their former shares therein, and such owner or partner so intending to defraud the other owners or partners shall also forfeit the sum of £20, to be recovered by action in the court of the Stannary wherein the said bounds do lie to the use of such of the other owners or partners as shall sue for the same."

"Section 2. And be it further declared and enacted, that if any tin-bounder, or keeper of tin-bounds for any person or persons shall suffer the said tin-bounds to be unrenewed, by means whereof they become void, without first giving at least one month's notice thereof in writing to such person or persons to whom he is bounder or keeper, that he will be no longer his, her, or their bounder or keeper of his, her or their tin-bounds; or if any such tin-bounder, or keeper of tin-bounds shall at any time, upon reasonable notice, refuse or neglect to show the corners or limits of such tin-bounds, of which he is bounder or keeper, to such person or persons to whom he is bounder or keeper, or to any other person or persons duly authorized by him, her, or them, to inspect the corners and limits of the said bounds, or shall deface any corner, or corners, limit, or side-bounds, any keeper so offending, shall forfeit the sum of £50, to be recovered as aforesaid. And if any bounds being void for want of

Laws of the  
Stannary  
Parlia-  
ment,  
26 & 27  
Geo. II.

renewing, as aforesaid, shall be cut by fraud to the use of the said keeper, or in trust for him, or any person or persons concerned with him, such cutting shall be, and is hereby enacted to be to the use of the said old owners, and every person party or privy to such fraud, shall forfeit the sum of £50, to be recovered as aforesaid."

"Section 3. And whereas tin-bounds, or tin-works in bounds lie often unwrought for the space of many years, to the great prejudice of the Stannaries, be it declared and enacted, that if any tin-bounds or tin-work, or tin-works in bounds, shall remain unwrought for the space of twelve months, and any person or persons shall be desirous to work for tin within such tin-bounds, he or they shall signify such his, or their purpose, to the owner or owners of the said tin-bound, or tin-bounds, their agent or bounder, and shall cause to be entered of record upon the Stannary Court book, in which the said tin-bounds, or tin-work, or tin-works in bounds lie, the place where the said tin-bounds, tin-work, or tin-works in tin-bounds he hath so proposed to work, lie; and likewise the name or names of the owner, or owners, agent, or bounder, to whom he, or they signified such his purpose, and the time thereof, and before whom, which he, or they shall verify by oath, and shall likewise, in such entry express the limits and extent of the said tin-bounds, tin-work, or tin-works he, or they so intend to work; and if the owner or owners of such tin-bounds, tin-work, or tin-works in such bounds, shall not work, set, or procure the said tin-bounds, tin-work, or tin-works in such bounds, to be wrought within two months after such entry and oath as aforesaid, it shall be lawful for the person or persons who gave such notice to the owner or owners, as aforesaid, to work the said tin-bounds, tin-work, or tin-works in the same manner as if he had a set thereof, upon paying the usual and accustomed farm; and that before he or they enter into the work as aforesaid, he or they shall enter into a bond, in the penalty of £100, with two sufficient sureties, who are likewise to enter into a bond, in the penalty of £50 each, to the owner or owners of the said tin-bounds, or one of them, in trust for the other owner, or



owners, for the well and effectually working the said tin-work, or tin-works; and that neither he, or they, his, or their partners, or any person employed by him, or them, shall break the pillars, backs, vault, or binding thereof, nor fill the adit, nor do anything to the prejudice of the said mine. And in case the person or persons so entering the said tin-bounds, or tin-work, or tin-works in such bounds, as aforesaid, shall neglect effectually to work the said tin-bound, or tin-bounds, tin-work, or tin-works in tin-bounds, or shall wilfully do, or suffer to be done anything to the prejudice or destruction of the said tin-bounds, tin-work, or tin-works in such bounds, such person or persons, and his, and their sureties, shall forfeit the penalty of the said respective bonds, and it shall and may be lawful for the owner and owners of the said tin-bounds to enter into, have again, hold, enjoy, and repossess the said tin-bounds, tin-work, or tin-works in the same manner as if this Act had never been made, provided always, that if the owner or owners are working in any tin-work in such tin-bounds, or are driving an adit to such tin-bounds, or doing any other act, in order to work effectually the said tin-bounds, although the said tin-bounds are not actually at work, within the space of one month after such notice, entry, record, and oath, as aforesaid, it shall not be lawful for such person to enter into and work any tin-bound, tin-work, or tin-works in the said bounds anything in this law to the contrary notwithstanding."

Laws of the  
Stannary  
Parliament,  
26 & 27  
Geo. II.

"Section 4. And whereas it has been a practice for tinners to bound, or cut bounds privately without the knowledge of the lord of the soil, whereby, after some years have elapsed, disputes have arisen between the lords and bounders, whether such lands have been boundable or not; and whereas in the Convocation or Parliament of Tinnors held in the reign of the late King James the Second, in order to prevent such inconvenience, it was enacted, that when any pitch of new bounds should be entered in the Stannary courts, the same should be openly proclaimed at that court, and two courts following before writ of possession should be granted, and should be engrossed and posted up in some

Laws of the  
Stannary  
Parlia-  
ment,  
26 & 27  
Geo. II.

Proclama-  
tions.

open place in the court during the continuance of such three courts; and that the person so cutting should likewise give notice in writing of such pitch to the lord or lords of the fee of the lands on which such bounds were cut, within one year after such pitch, and should prove such notice given, otherwise such pitch to be void; and whereas notwithstanding the aforesaid laws divers inconveniences have arisen in cutting bounds; be it declared and enacted that all bounds, hereafter to be cut, shall be void, unless the lord or lords of the soil, his, or their agent, or toller, hath notice given him or them in writing at least three months before such cutting, that such cutting is intended; and if the lord of the soil shall upon such notice think fit to cut such bounds to his own use, then it shall be lawful for him so to do at any time, within three months after notice given as aforesaid, and before any proclamation of any bounds is received, the person so cutting them, shall make oath before the steward of the Stannaries wherein the said bounds lie of his having given such notice as aforesaid; provided always, that in case the lord or owner of the soil shall neglect, either by himself, or toller, or agent, to cut such bounds within three months next after notice given as aforesaid; in such case the person by or on whose behalf such notice was given shall be entitled to the liberty of cutting such bounds, and shall and may have and enjoy the same to his own use according to the customs of the Stannaries of Cornwall, anything herein contained to the contrary notwithstanding. And be it further enacted, that if the owner or owners of any bounds hereafter to be cut shall not within three years after the proclamations are passed, deliver toll-tin to the lord of the soil in which such bounds are cut, or at least proceed and continue effectually to work the same; that then and in such case, such bounds shall be null and void to all intents and purposes, as if the said bounds had never been cut."

"Section 5. And whereas several inconveniences arise to the lords of the soil, for want of knowing the corners and limits of bounds cut upon their lands; be it declared and enacted that every tin-bounder, renewer, or keeper of

bounds, shall upon request made to him by the lord of the soil, his agent, or toller; with the day on which the said bounds are renewed, and shall likewise on the day and at the time of renewal, show to the said lord, his agent or toller, the corners and limits of the said bounds respectively; and in case any tin-bounder, renewer or keeper of tin-bounds, shall refuse to acquaint the lord of the soil, his agent or toller, with the day of such renewal, or shall refuse to show the lord of the soil, his agent or toller, the corners and limits of the said bounds respectively, at the time he renews the same, upon such request made as aforesaid, he shall forfeit the sum of £20, to be recovered by action in the Court of the Stannary, wherein the said bounds lie, to the use of the person or persons aggrieved thereby."

Laws of the  
Stannary  
Parliament,  
26 & 27  
Geo. II.

"Section 6. Whereas it frequently happens, that where there are several part-owners of tin-bounds, and some of the owners are willing to work the said bounds, but are prevented from so doing, because others of the owners refuse either to adventure or set their shares, which is a great hardship upon the owners, who are willing to work the said bounds, and also upon the lord of the soil; in order to prevent such inconveniences, be it declared and enacted, that where there are several owners of tin-bounds, which owners who upon reasonable warning given them, by such of the other owners as have at least one-half of the right and interest in the said bounds, shall not either set their parts to farm or bring in their men or money according to their parts, within one month after the other part-owners, or any person or persons claiming under them, have begun to work their bounds; such owners having such notice, and refusing to work as aforesaid, shall be excluded from setting the said bounds, or adventuring therein during the adventure so begun, and shall have only such farm in proportion to their share, as is the usual and accustomed farm; unless any of the other owners have set their parts; and in that case the owner or owners, so refusing to adventure, shall have such farm as the other owners, who have set their parts, have reserved in their set,

One of  
several  
owners re-  
fusing to  
work the  
bounds.



Laws of the  
Stannary  
Parliament,  
26 & 27  
Geo. II.

or else the accustomed farm at the election of the said owner, or owners, so refusing to adventure."

"Item. Whereas it is a frequent practice for tinnerns working in bounds or several lands, to dig and carry away tin or tin-stuff from the next adjoining bounds, lands, or adventures in the same bounds or lands; and it has hitherto been considered as the law of the Stannaries, that the tinnerns so digging and carrying away tin or tin-stuff have right to the same, till notice given them by the owners of the next adjoining bounds, lands, or adventures, and until an admeasurement is had by virtue of the vice-warden's order, which practice has often been productive of great frauds in the working of mines; now in order to prevent such frauds, and to put an end to a practice so unequitable, be it hereby declared and enacted, that it shall not be lawful for any owner or owners, adventurer or adventurers, tinner or tinnerns, under any pretended right or custom whatsoever, to dig or carry away tin or tin-stuff from the next adjoining bounds, lands, or adjoining adventures in the same bounds or lands; and if they or either of them so do, they shall be answerable for the tin or tin-stuff they so carry away, to the owners and adventurers in the next adjoining lands or bounds, or adjoining adventures in the same lands or bounds, from whence the tin or tin-stuff was carried away according to their respective shares in damages to be recovered by action in the court of the Stannary wherein the said tin was dug. And whereas it is difficult for the owners of, and adventurers in the next adjoining lands, bounds, or adventures, to know when the tinnerns are digging into and taking away tin or tin-stuff from their said lands, bounds, or adventures; in order to make the knowledge thereof more easy, be it declared and enacted, that upon request made in writing by, or on the behalf of, the owner or owners, adventurer or adventurers, in such next adjoining lands, bounds, or adventures in the same lands or bounds to the tinner or tinnerns digging as aforesaid, or to one of them for liberty to go down and measure the ground, such liberty shall from time to time be granted, together with the use of the tackle for so

doing, and in default thereof, it shall and may be lawful to and for the vice-warden of the Stannaries, and he is hereby authorized and required to give an order in writing, directing such person or persons so refusing, to permit the person or persons so requesting to go down, in order to admeasure the said ground, and such person and persons respectively, who upon such order shall refuse to obey such order, shall be fined at the discretion of the vice-warden. And if after such admeasurement it appears, that such tinmer or tinners, is or are, or have been digging in the next adjoining lands or bounds, or adjoining adventures in the same lands or bounds, or if that appear doubtful, it shall be lawful for the vice-warden to issue his injunction for staying the said tinners from working in the said lands or bounds, or adventures, and from carrying off the said tin-stuff in question, till such doubt be tried in the Stannary Court. And be it farther enacted, that such trial shall be had by a special jury, at a special court on the surface of the place in which the dispute arises, if either of the parties desire the same, by action of trespass to be brought for that purpose. And be it hereby farther declared and enacted, that the eighth article passed in the convocation held in the reign of the late King James the Second be and is hereby repealed.”

Laws of the  
Stannary  
Parliament,  
26 & 27  
Geo. II.

The Court Rolls of the Stannaries are also evidence of the existence of the custom (*z*), but owing to the imperfect state of the earlier entries we must content ourselves with a reference to those entries which date about the 17 or 18 Henry VII. Respecting the entry and proclamation of bounds, Mr. Smirke says (*a*), “That whatever formalities may have been required in establishing this species of property, the necessity of entering the bounds and proclaiming them in the Steward’s Court was not recognized before the reign of Henry VII.,” and he proceeds to establish this proposition by adducing four proofs: “First, the total silence of the rolls before that period. Second, the ex-

Court  
rolls.

(*z*) Pearce’s Stan. Introd. pp. 13-22; Smirke’s Stan. 12, 17, 26, 32, 36; App. 58-61, 78, 77.

(*a*) Smith’s Stan. 101.

press declaration of the tanners of Penwith and Kerrier, at a court held in 1616, that proclamations were not so old as bounds. Third, the existence of an authentic record showing the introduction of a similar form of claim in the Devonshire Stannaries in 10 Hen. VII. Fourth, the charter of pardon, 23 Hen. VII." But, whatever may have been the requisite formalities of the custom before the time of Henry VII., the entry of bounds and the proclamation thereof were declared necessary and enforced, as we have seen, by the Stannary laws before referred to (b).

Bounds  
described  
in *Rowe v.*  
*Brenton.*

Having given a description and summary of the laws relating to the custom in the Stannary Parliaments, we shall do well to notice the description given of it in some modern cases. Lord Brougham, when Mr. Brougham, as counsel for the plaintiff in *Rowe and Brenton* (c), is reported to have said that the "law or usage as between the freeholder and the miner was this: that the miner had a right to go upon the lord's or the freeholder's tenement and cut bounds; that is to say, cut up a turf so as to form a mark upon the surface or area of the soil which those people called bounds. The miner then, at the Stannary Court, gave notice to the lord, that if the lord would not work the tin mines under those bounds, he, the miner, who proposed to do so, claimed that privilege. Accordingly, this notice was given in three successive courts, according to the usage of the Stannary laws passed; and if at those three courts the lord, who had the first right to work the tin mines under his own soil, would not work them, the miner, through that process, acquired a right as against the lord; and that is what is commonly called bounds. He had the right then to open mines and to work the tin in those mines. Gentlemen in those parts of the manor which were waste, or in those parts of the manor which were conventional, and where he had the right of minerals, this right or custom of bounding was equally prevalent against the Duke of Cornwall as it would be against a private individual owner in fee; and therefore, under the circumstances I have mentioned of the Duke of Cornwall, you

(b) *Ante*, pp. 349, 350, 353, 360, 366, 368. (c) *Concannen's Rep.* p. 80.



may well suppose that, in those days, he would not carry on, or his agents or ministers would not carry on, mining operations; assuming, as I do, that this usage, or practice, by which, if the lord refused to exercise his right, the right of working devolved to the miner, applies in the case of the Duke of Cornwall (*d*), as the freeholder of those mines. If he would not work himself when those three courts were passed, the bounder worked; and the bounder working, then according to that, which seems to have grown up into a custom, there the toll was given to the lord; and that toll, though not entirely uniform, seems to have been a twelfth and a fifteenth (*e*) of the minerals got up, which was sometimes taken in specie, and sometimes an equivalent in money was given for it."

A description of the custom was given by Lord Denman in the case of *Rogers v. Brenton* (*f*). His lordship said: "There can be no doubt that it is most reasonable, fulfilling every requisite of a good custom. In substance it is this: the mine is parcel of the soil; the ownership is in the owner of the soil; but it is a parcel which to discover and bring to the surface may ordinarily require capital, skill, enterprise, and combination; which, while in the bowels of the earth, is wholly useless to the owner, as well as to the public; and the bringing of which into the market is eminently for the benefit of the public. If, therefore, the owner of the soil cannot or will not do this for himself, he shall not be allowed to lock it up from the public: and, therefore, in such case (unless when by enclosure he may seem to have devoted the land to other important purposes inconsistent with mining operations, such as agriculture or building), any tinner, *i.e.* any man employing himself in tin mining, may secure to himself the right to dig the mines under the land, rendering a certain portion of the produce to the owner of the soil. It is right to observe, in passing, how every step, even in this strong invasion of the rights of ownership, still is made with reference to them. In the first place, the land to be bounded (we speak of a supposed original case of bounding) must be wastrel: if it be

Description of the customs in *Rogers v. Brenton*.

(*d*) Ante, p. 349.

(*e*) Ante, pp. 349, 356.

(*f*) 10 Q.B. p. 50.

several and enclosed, it must have been anciently bounded while wastrel, and so, in the language of the country, assured for wastrel: the liability must have first attached on it, therefore, before enclosure and devotion to other useful purposes. Then, after the tinner or bounder has commenced by cutting the turves, and so marking on the limits within which he will work, proceedings are to be taken in the Stannary Courts, of which the owner has notice; and sufficient time is allowed before the bounder's title becomes complete, during which the owner may still intervene and preserve his rights entire, so as he will exercise them for the benefit of the public. If he abstain from any interference, it may well be considered that he has consented to the bounder's proceedings; and the customary render of the portion called toll tin may be a very sufficient consideration to him for what he gives up of his original exclusive rights (*g*).

Custom  
referred  
to in Acts  
of Par-  
liament.

By section 43 of 6 & 7 Will. IV. c. 106, the liberties, privileges, and *customs* of the said Stannaries in force at the time of the passing of that Act, so far as they are not repugnant to the laws of the land, or inconsistent with that Act, are to continue, and be, and have the same force and effect as though the Act had not passed; and by the 41st section of that Act the *proclamations* (of bounds) (*h*) theretofore required to be made in any of the courts of the Stannaries, of the vice-warden or steward of any of the Stannaries, are still to be made, and deposited in the newly-constituted courts of the vice-warden. By section 32 of 7 & 8 Vic. c. 105, "the custom or supposed custom of bounding" and "tin-bounds" are exempted from the inquiries directed by that Act, and by section 84 of the last-mentioned statute nothing therein contained is to affect or to extend to any lawful right, profit, privilege, or easement to which the tanners of Cornwall were or claimed to be entitled to under or by virtue of any statute, custom, pre-

(*g*) Rogers v. Brenton, 10 Q.B. p. 50.

used in the Act, but there is nothing except "Bounds" to which the word proclamation could apply.

(*h*) The word "Bounds" is not

scription, or royal charter; and by the 17th section of 18 Vic. c. 32, if "the custom of tin-bounds" is raised in any action pending in any county court, the judge of that court may remit such question to the vice-warden of the Stannaries for his decision.

In the case of *Crease v. Barrett* (*i*) the custom was formally set out in the pleadings, and the jury not only decided in favour of the existence of the custom, but that it was a part of the custom of the locus in quo to pay a toll of *one-tenth*, the usual toll or due being, as we have before remarked, *one-fifteenth* (*j*).

In *Doe d. Earl of Falmouth*, the custom again came under the consideration of the court, upon motion for a new trial, and, after the case had been twice argued, Mr. Baron Parke is reported to have said (*k*), the "first question is, whether, by the custom, the bound-owner has only an easement, that is, a right to enter and dig for tin, the possession of the soil and rest of the mine remaining in the lord; or whether he has such an interest and title in the mine, that he may, for the purpose of getting tin, exclude the lord from the possession? It is difficult to see how this is to be put as a question of fact; but I am bound to do so; and if it should turn out to be, as I incline to think it is, rather a question of law, the court above will know how to deal with it. No doubt, the bounder is entitled to nothing but the tin, and it is proved that tin and other metals are often found together; but there is no proof of any usage to grant concurrent sets of different metals to different adventurers, who are to work together. On the other hand, there is no reason, if such be the custom, why the mine should not be considered to be in the possession of the lord, subject to the right of another to search in it for tin. The next question is, as to the evidence of immemorial bounds. There is evidence of renewal on behalf of successive bound-holders for many years, and this will justify you in finding them to be immemorial, where no proof of

Legal  
decisions,  
*Crease v.*  
*Barrett.*

*Doe d.*  
*Earl of*  
*Falmouth.*

Tin only  
subject to  
the custom.

Imme-  
morial  
custom.

(*i*) 1 C. M. & R. 920.  
(*j*) Ante, pp. 356, 365.

(*k*) *Smirke's Stan. App.* p. 89.



Renewing  
and pre-  
servation  
of bounds.

their origin appears. In such a case proclamation (*l*) and other formalities, if necessary, will be presumed. Whether the defendant has had a strict legal conveyance of the bounds is immaterial, especially as there seems to be no doubt that a bound-owner may license another to enter and work without leave of the lord. Then as to the due preservation of the bounds by renewal (*m*), the only defect in the evidence is in the years 1831, 1832, and 1834. The day of annual renewal was the 24th of August, unless that day was Sunday, and there was proof of regular renewal in 1833, 1835, and 1836. There was some slight evidence of renewal in 1834; and as the defendant had just before become the purchaser, and certainly did renew in the year before and after 1834, you will perhaps find without difficulty, as a very probable conclusion, that defendant did not omit to renew in that year. But there is no proof as to the two years 1831, 1832. Then it is said that the Stannary custom, stated in 22 James II. s. 18 (*n*), cures the omission; for that if the keeper of the bounds 'carelessly lets slip his day of renewing, and afterwards renews before another tinner cuts a new pitch, such renewing shall be taken to be a good renewing against any other pitch;' and some parol evidence was given that such an omission to renew is not forfeiture. Such a renewal may be enough to exclude another fresh pitch, but it does not follow that it will keep up the old one as against the lord. The omission to renew seems not to be a forfeiture, in the proper sense of the word, but by it the bounds are lapsed and gone; the lord has the land free from bounds; and there is nothing in the evidence, or in the printed laws, to show that he is excluded under such circumstances. Indeed, if renewal may be discontinued and then renewed at any distance of time as against the lord, there is no reason for insisting, as the custom does, on the punctual performance of the ceremony on every anniversary of the original pitch. It is true, that working alone may be sufficient to keep up the right, without strict renewal, provided the evidence of the limits is preserved; but there has been no working for several years."

(*l*) Ante, pp. 348, 350, 353, 360,  
366.

(*m*) Ante, pp. 349, 351.

(*n*) Ante, p. 349.

The result of this case was to decide that the bound-owner had not a mere easement, but an interest in the mine, that the bounds in that particular case were immemorial, and that they had not been properly kept up and renewed.

The next case came before the Lord Warden by way of appeal from the Vice-Warden of the Stannaries (*o*). One Enys being lawfully possessed of some tin-bounds, demised them for 21 years to Thomas, the respondent (the plaintiff below), who entered and worked for tin, erected buildings and machinery, expending about £10,000, and continued working for about four years, during which he raised large quantities of ore; he then ceased working, leaving the erections and machinery standing, with the intention (as alleged) of resuming the works; the bounds were duly renewed at the proper times. About seven years after, the appellant (the defendant below) entered and worked the mines. The respondent (the plaintiff below) presented his petition on the equity side of the Vice-Warden's Court, setting out these facts, and praying for a decree that the possession of the tin-bounds should be delivered up to him, and for an account of the profits. To this petition a demurrer was filed on the ground (*inter alia*) that the Vice-Warden had no jurisdiction, on the equity side of his court, to try a title to mines; the demurrer was overruled by the Vice-Warden, but allowed, on appeal, by the Lord Warden, and consequently the right to the tin-bounds was not gone into. The present Solicitor-General says, that (*p*) "the legal point decided in this case may be thus shortly stated:—that the owner of a tin-bound, who has worked within his bounds and has quitted them with the intention of returning, may, after a lapse of seven years (the bounds having been annually renewed), by proceedings at common law, recover possession of them against a person who has entered without title." But it is submitted, that this inference is hardly supported by the judgment in *Vice v. Thomas*, though such an inference might perhaps, if at all, be drawn from the subsequent decision in the case of *Rogers v. Brenton*.

Vice v.  
Thomas.

(*o*) 4 You. & C. 538; Smirke's Rep. p. 14. (*p*) Collier on Mines, p. 33.

Rogers v.  
Brenton.

In *Rogers v. Brenton*, the plaintiff claimed, as "bounder" or "owner of a pair of bounds," the right, according to the custom of Cornwall, to dig, get, raise, and carry away for his own use, tin and tin ore, from and out of the land of another person (*q*). This claim was disputed by the defendant, who was stated to be the agent of a body of adventurers who had been working within or near the said bounds for several years. It appears that the "tin bounder"—the claimant—had not cut or pitched the bounds within living memory, nor was there any evidence of their commencement, but proof was given of their annual renewal for seventy years past; small quantities of tin had been raised, and the customary toll paid to the lord at different periods, but none later than forty years before suit. The plaintiff also gave in evidence "the roll of the Stannary Convocations or Parliament, held 22 Jac. I.; 1 Car. I.; 12 Car. I.; 2 Jac. II. and 26 Geo. II., and relied particularly upon the following laws, viz. the 17 & 18 articles (*r*) of 22 Jac. I.; 3, 4, & 31 of 12 Car. I. (*s*); 2 & 4 of 2 Jac. II. (*t*); and part of article 8, s. 1, of 26 Geo. II. (*u*). These were put in as declarations of the custom. The commissions under which the convocations 2 Jac. II. and 26 Geo. II. were held were also proved, none earlier being found (*v*); they showed that the convocation professed to make new laws, as well as present old customs. A charter of 23 Hen. VII. was put in, which, among other things, recognised bounders (bundatores) as being possessed of tin-works (opera stanni), and their obligation to enter the description of newly-bounded works in the Stannary Court (*w*). Certain extracts from the court rolls of the stewards of the four Stannaries in the reigns of Hen. VI., Hen. VII., Eliz., and Jac. I. were read, to show the early existence of tin-bounds, or "opera stannaria," proclamations of them in the Stannary Court, and presentments of the custom generally. Ministers' accounts rendered to the

Stannary  
laws.

Ministers'  
accounts.

(*q*) 10 Q.B. 26; s.c. 17 L.J. Q.B.  
34.

(*r*) Ante, pp. 348, 349.

(*s*) Ante, pp. 349, 352.

(*t*) Ante, pp. 353, 354.

(*u*) Ante, p. 356.

(*v*) The last commission is printed in the Appendix (F) to *Rowe v. Brenton*, 3 Man. & Ry. 497.

(*w*) Appendix to *Vice v. Thomas*, Smirke, App. p. 31; the original charter is in the Patent Roll.



crown by officers of the duchy in 25 & 29 Edv. I.; 28 Edv. III.; 7 & 8 Hen. VII.; 21 & 22 Hen. VII.; 22 & 23 Hen. VII.; were produced, to show the receipt by the lord of the manor of "toll tin," from tin-works; the toll tin being explained to mean the customary dues payable to the freeholder out of the bounded tin mines. Leases by the crown and duchy of "toll tin" belonging to the duchy, and also of "tin mines" in enclosed land were read (x). The assession roll, 2 Ric. II., and the answer of tenants to interrogatories, at an Assession Court (y) held for the manor of Helston in Kerrier, in 1619, were produced to show the existence of bounded tin mines, rendering toll to the lord of that manor. Parol evidence was also given by mine agents, solicitors, land agents, and old tollers, who spoke of the general prevalence of the custom in different parts of Cornwall, the large receipts of dues by owners of tin-bounds, and the extent to which they were made the subject of sale, devise, and settlement; and that the customary amount of toll, viz. one-fifteenth, was sometimes waived by agreement. They all agreed that, after being legally set on foot, the bounds could be preserved by mere annual renewal of the turfs or bounds at the corners; and they did not speak of the bounds as consisting of any particular number of turfs. Some of the witnesses doubted whether even this ceremony was strictly necessary except as evidence of the right. They also differed as to the consequence of neglecting to renew on the exact day. None could assign any limit to the surface of land that might be included in the four corners; but it was said to be generally of very small dimensions. One of the most experienced witnesses remembered a pair of tin-bounds "a quarter of a mile each way," but this was the largest he knew of. Only one instance of newly-proclaimed bounds was recollected by any witness; all the wastes of tin mining districts being supposed to be already under ancient bounds. No evidence was given on the part of the defendant (z).

Rogers v.  
Brenton.

Parol evi-  
dence.

(x) Concannen's Rep. of Rowe & (y) Ante, p. 113.  
Brenton, App. pp. 205, 211, 217, &c. (z) Collier, p. 36.

Rogers v.  
Brenton.

Justice Wightman (before whom the case was tried) told the jury that the reasonableness of the custom could be considered by them only as an element in forming their opinion whether it existed in fact: that if working was essential to the custom, they should find for the defendant; but if the custom was that bounds duly proclaimed and renewed gave an exclusive right to the tin, then they should find for the plaintiff. The jury found a verdict for the plaintiff (a).

Lord Den-  
man's judg-  
ment.

On the argument of a rule to enter a nonsuit (in pursuance of leave), it was contended (among other things) in behalf of the defendant, that the custom alleged was void in law. 1st, because a right to take a profit in the land of another cannot be claimed by custom (though it may be by prescription); 2ndly, because the custom was unreasonable. On both these points, and on the custom generally, we quote Lord Denman's judgment. His lordship said, "This, then, brings us to the point which was more especially contested on the argument, whether this customary right can exist without continuing *bonâ fide* to search for tin, and to work the land for mining purposes within the enclosed limits; whether it is sufficient merely to renew the bounds annually by a new cutting of the turfs as at the commencement. Assuming for the present the validity of the custom, if the *bonâ fide* working within the bounds be made a part of it, and assuming that it is a custom which is to be tried by the tests established by the common law for ascertaining whether a custom be good or not, it appears to us that without this qualification it cannot be sustained. Customs, especially where they derogate from the general rights of property, must be construed strictly; and above all things they must be reasonable. Bounding is a direct interference with the common law rights of property; it takes from the owner of the land, who is unable or unwilling at a particular moment to dig for tin under his waste land, the right to do so, it may be for ever, and vests it in a stranger, making only a customary render in return: it empowers the stranger not only to extract the mineral

Custom  
must be  
strictly  
construed.

(a) A Middlesex jury, the venue having been changed from Cornwall by a Judge's order.

from beneath the surface, but to enter on the surface and cumber it with machinery, buildings, and refuse stuff which the operations below occasion, and all this without the least regard to the convenience or interest of the owner. The only things which make this reasonable are the render of the toll tin to the owner, and the benefit to the public secured thereby in the extraction of the mineral from the bowels of the earth. Both these are not only lost, but the latter, it may be, positively prevented, if the bounder may decline to work and yet retain the right to exclude the owner. Instead of ensuring that the minerals should be brought to the surface, the custom so construed may be made the means of keeping them locked up within it, and at the same time preventing any improvement in the surface. Many bounds may become the property of the same owners, who may think their interests best served by limiting the supply and diminishing competition, while the owner will decline to spend his capital in building or agricultural improvements, because at any moment the bounder may renew his operations, and entirely, and without compensation, defeat the purposes of his expenditure. If it be said that the public good is best served by that regulated supply which best serves the private interests of the bounder, that wherever it is for the interest of the public that the mine should be worked, the interest of the bounder will be to meet the demand by an adequate supply, and that when the mine is not worked, it is only because it is for the interest equally of both that it should not be; without admitting or denying the truth of these assertions, one answer is, that where such a state of things has existed so long and so decidedly as to amount to reasonable proof that the original purpose with which the bounds were enclosed has been abandoned, it is unreasonable to maintain the bounds themselves. It may have been that the owner did not enclose the land, or work for the mineral himself, only on account of a temporary inability, or the temporary existence of the same causes which the bounder now alleges as the ground for his ceasing to work. Why, then, is he to lose his earlier and better right for ever, and, under the

Rogers v.  
Brenton.



Rogers v.  
Brenton.

same circumstances, the bounder to preserve his? Another answer is drawn from regarding the original purpose of the custom, which was not founded on the doctrine of demand and supply, but on the expediency simply of bringing the mineral to the surface for the use of men. Another, if another be needed, is that the render of a portion of the mineral to the owner of the land is part of the consideration on which the bounder's right was originally founded; it is part of the compact, without which it may be that the landowner would never have consented to the bounds; and it is of course quite independent of such considerations as that of working profitably to the miner. The condition that the bounds shall be annually renewed by new cutting the turfs is useful for keeping the limits well ascertained, and also for preserving the evidence of ownership; but it is no substitute for the working itself, considered as the ground on which the reasonableness of the custom rests. When the evidence in this case is referred to, the variations and uncertainty in which those are involved who contend that the bound-owner need not work, strongly favour the conclusion in law, at which we have arrived. The jury, indeed, have drawn a conclusion of fact from the whole, which, as such, we should not feel disposed to disturb; for it was their province to draw it from the statements submitted to them. But on reading the report, and finding among other things that there is a conflict among the witnesses, who from professional habits might have been supposed best able to speak to the point, whether even an annual renewal of the bounds be necessary to preserve the ownership in the bounds, and also that much reliance seems to have been placed on the fact, entirely inconclusive, that owners of land have in many instances not proceeded as for forfeiture of the bounds where the mines have not been worked, we see every reason to believe that the unqualified right now claimed is but an abuse of the original limits of the custom, inconsistent with its object, and not to be sustained on any principle" (b).

(b) Lord Denman, in describing the customs generally, called it a reasonable good custom, *ante*, p. 365.

Mr. Smirke (the present Vice-Warden) has adduced some strong arguments against the custom. He reasons as follows: 1st. That the evidence of the custom, documentary and parol, prescribes no limits to the area capable of being included in a pale of tin-bounds. 2ndly. That the extent of working necessary to secure the title of the bound-owner is not ascertained; and he refers to the custom in Devon, and especially to an attempt made in 1786 to enclose the whole of Dartmoor, in that county. 3rdly. That the right of the bounder is of no value without the use of running water (*c*). 4thly. That the custom asserts a right not only to "take," but to "search for" tin; that "whether the search is to be justified only by the successful result of it, or the claimant is to dig at will for an unlimited time over a bounded area in the mere chance of success, is a matter on which the custom and its interpreters are silent." 5thly. That the custom nowhere provides for the occurrence of veins of mixed metals, but is evidently adapted only to the superficial tin-works, formerly very productive, called stream-works, and that the bounder must claim a right to deal with, and, if need be, destroy the property of another, or must work at the peril of becoming an involuntary wrong-doer, by detaching from the vein a metal which does not belong to him, and was not the object of his search. 6thly. That a still more serious difficulty occurs, arising from the fact that a large proportion of the lands in Cornwall is, or heretofore was, of customary tenure; that in such lands the mines belong to the lord of the manor, and not to the customary tenant (*d*), and that the toll tin is paid by the bounder to the lord and not to the owner of the surface, who alone is injured by the workings, but to whom the custom awards no share or compensation at all, consequently, that the custom mainly relied upon in support of the reasonableness of the custom, fails in a large class of tenements.

Smirke's  
opinion.

Mixed  
veins.

These deductions of Mr. Smirke are entitled to considerable weight; and whilst we are disposed to concur in them

(c) Post, title "Water-courses."

(d) *Rowe v. Brenton*, 8 B. & C. 737.

to a limited extent as fair and reasonable deductions from the judgment in the case of Rogers and Brenton, we think a larger view of the custom may be entertained if we carefully consider the charter of John, the presentment of the custom by the tinnerns at the Stannary Parliaments, and the proceedings in the Stannary Courts for several centuries.

Attorney-  
General v.  
Mathias.

In a recent (*e*) case Justice Byles said, "It is true that the Court of Queen's Bench, in *Rogers v. Brenton*, expressed an extra-judicial opinion that the custom of tin-bounding, in Cornwall, which involves the taking of a profit *in alieno solo*, might have been good if coupled with an obligation to work; but assuming that opinion to be correct, I am not aware that it has ever been extended to any other case; and so difficult did the learned counsel for the plaintiff in *Rogers v. Brenton* feel their position to be, that they desired to treat the custom which they were bound to support, as the *lex loci* of a province."

Constable  
v. Nichol-  
son.

Chief Justice Erle, in *Constable v. Nicholson* (*f*), said that the claim of "profit *in alieno solo*," alleged in *Rogers v. Brenton*, which was then not sustained on account of its having been badly pleaded, has been since held to be bad, because it is too uncertain. The author is not aware, however, of any authority for this assertion, on the contrary, he does not remember any case where the validity of the custom has been raised since the case of *Rogers v. Brenton*. Numerous cases have occurred in reference to claims of profit *in alieno solo* (*g*), but it is doubtful where those cases can be cited against the Cornish custom of tin-bounding. In any event, the author deems it right to suggest some reasons in support of the custom.

Result of  
authorities.

1. That the custom is good because it will bear the test of the principles applicable to all customs (*h*).

2. That in order to preserve the bounds, they must be bonâ fide and continuously worked, and annually renewed;

(*e*) Atty.-Genl. v. Mathias, 27 L.J. Ch. 766.

(*f*) 14 C.B. N.S. 238.

(*g*) Ante, pp. 328, 333.

(*h*) Reg. v. Crease, 11 Ad. & Ell. 677; Crease v. Sawle, 2 Q.B. 862; *Rogers v. Brenton*, 10 Q.B. 63; ante, pp. 327, 374 (note *b*).



and that renewal alone, without working, is no substitute for working (*i*). Result of authorities.

3. That whether the working has been continuous or not is a question to be decided from all the circumstances of the case; reasonable time for consideration, preparation, due selection of places, and plans, being allowed. That if for these, or any other lawful purpose, the works have been temporarily suspended, exemption therefrom can be given. In fact, it is only when the conduct of the bounder has been such as to warrant a conclusion that he has ceased to do what justified his entry on the land and gave him his title, that a forfeiture can be supported (*j*).

4. That no land can be bounded except wastrel lands, or lands that were anciently bounded as *wastrel*, and consequently bounding would not now be lawful which would destroy houses or erections built thereon, or cultivated land, or land set apart for a permanent useful purpose (*k*).

5. That proclamation of the bounds is still necessary (*l*).

6. That the customary toll must be paid to the lord of the soil; that although the toll is usually a fifteenth, it may be any other customary toll (*m*).

7. That the bounder out of possession, actual or constructive, has no interest whatever in the soil, but only to the minerals when severed (*n*).

8. That the bounder, merely as such, has no title to copper, or any other ore raised with the tin; tin, and tin only, being the property of the bounder (*o*).

9. That although the custom of bounding, as above qualified, is open to grave objections; and notwithstanding that the judgment in *Rogers v. Brenton* must be taken to have shaken to some extent the bounder's title, any one,

(*i*) Carew's Survey of Cornwall, f. 13 Ed. 1769; Rowe and Brenton, 8 B. & C. 737; Doe d. Earl of Falmouth, ante, p. 368; Lord Denman's Judgt. in *Rogers & Brenton*, 10 Q.B. 58-9-60, 64; Att.-Gen. v. Mathias, 27 L.J. Ch. 766.

(*j*) *Rogers v. Brenton*, 10 Q.B. 64.

(*k*) Convoc. 11 & 12 Chas. I., and ante, pp. 349, 356; *Rogers v. Brenton*, 10 Q.B. p. 50, and ante, p. 372.

(*l*) 6 & 7 Will. IV. c. 106, s. 41; ante, p. 366.

(*m*) Convoc. 2 Jas. II., and ante, pp. 356, 365, 371; *Crease v. Barrett*, 1 C. M. & R. 920.

(*n*) *Rogers v. Brenton*, *suprà*.

(*o*) *Rogers v. Brenton*, 10 Q.B. 56, 57; ante, pp. 372, 375.

at this moment, may pitch new bounds in any waste land, or land previously bounded as wastrel, and acquire and retain the right to work the land within those bounds without the consent of the lord of the manor or owner in fee, subject to the foregoing conditions and exceptions (*p*).

10. Finally, that the custom in Cornwall is not bad because it sanctions the taking of a profit *in alieno solo* (*q*), a similar custom in Derbyshire (*r*) having been confirmed by statute, and is believed to exist in many countries on the Continent, and is not opposed to the civil law in its purest times (*s*).

DEVON-  
SHIRE.

It will be observed, that the description of the custom of bounding which we have given, refers to Cornwall only, but, for the most part, the custom in Devon very nearly resembles the Cornish system. The charter of John (*t*), as we have seen, applies to both counties, and Devon can prove the existence of the custom from the convocation roll of the Stannary Parliaments held for her own county; but owing to the very limited extent of the custom in Devon, there are but few instances of boundings, or legal decisions recorded in reference to it (*u*). The two points of difference would seem to be this, that whilst in Cornwall the bounder's interest is a chattel real, which descends to his executor (*v*), in Devon the bounder's interest is a freehold which descends to his heir; and whilst, in the former county, a toll must be paid to the lord, in the latter, no toll whatever is payable. But although these two points of difference do exist, so far as the custom of Devon can be ascertained, there seems but little room for doubt that, inasmuch as the Cornish custom has been supported because it possesses the essentials of a good custom, one of which being a benefit to the owner of the bounded land, as well as a charge on the bounder, a court of law would probably declare the custom in Devon bad in law, even should a jury find its existence in fact, unless accompanied by the obli-

(*p*) Rogers v. Brenton, 10 Q.B. 66-68.

(*q*) Ante, pp. 328, 333, 376.

(*r*) Post, p. 442.

(*s*) Ante, pp. 17, 22, 24, 30, 41, 46.

(*t*) Ante, p. 76.

(*u*) Pearce's Stan. 185-226.

(*v*) 2 Jus. 2, 4 Stany. Laws, p. 62.

gations attached to the Cornish custom of paying, among other obligations, a toll to the lord. It must also be borne in mind, that the mining customs of Devon have not received the same statutory recognition as those of Cornwall, and a cautious exercise of the privilege is consequently recommended. For further information of the custom of bounding in Devon, and for the other mining customs in that county, reference may be made to "The Olde Lawes and Statutes of the Stannarie of Deuon," which will be found in the British Museum. "Pearce's Stannary Laws" also contains the custom of bounding in Devon as well as in Cornwall (*w*).

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#### CUSTOMARY LAWS OF THE COST-BOOK SYSTEM.

*Adventurer's Liability.*

*No System of Credit allowed.*

*Inspection of Books.*

*Inspection of Mines.*

*Transfers and relinquishment of shares.*

*Creditors' lien on Mine and Machinery.*

*Lien on shares for costs and calls.*

*Purser's right to sue for arrears of calls.*

*Miners' exclusive privilege to sue and be sued.*

THE adventure, according to custom, is divided into equal parts or shares, usually a multiple of 8, say 64, 128, 256. Each adventurer is liable for all debts contracted during the time of his being a shareholder, and only for such time as he is a shareholder; so that no liability attaches for debts contracted previously to his becoming a partner, or after he has ceased to be a partner (*x*). Adventurer's liability.

No system of credit is allowed, except for necessities for carrying on a mine; and no director, purser, or agent has any right to pledge the credit of the adventurers, or one adventurer to pledge the credit of another adventurer, for anything but actual necessities, and even for necessities Credit.

(*w*) Pearce's Stan. 185-226.

(*x*) Stannary Laws, p. 63; Walker v. Bartlett, 25 L.J. C.P. 156, 263;

Thomas v. Clark, 25 L.J. C.P. 309;

18 C.B. 662; Watson v. Eales, 26 L.J. Ch. 361.



the authority is very limited (*y*). No bills of exchange, promissory notes, or other negotiable instruments can be drawn or accepted by the directors or agents of the company, or any loans contracted, which will bind the adventurers individually. This latter principle, although generally applicable to all mining companies, is most stringently construed in reference to Cost-Book Companies (*z*).

Inspection  
of books.

The books and accounts should be kept at the counting-house of the mine, unless, by resolution passed by a majority of the shareholders, at a meeting duly convened, they are directed to be kept elsewhere; and now, in case of non-compliance with this custom, or for other good reasons, the Vice-Warden of the Stannaries may compel the production of any of the books of the company for the inspection of any adventurer (*a*).

Inspection  
of mines.

Every adventurer has a right to inspect the underground workings of a mine at pleasure, but this right may be controlled by a resolution of the shareholders passed at a meeting of the adventurers duly convened for that purpose. An application was made by an adventurer to the Vice-Warden for an order to inspect the underground workings of East Caradon Mine, in Cornwall. The facts were these: It appeared that in 1852 certain persons united themselves together for the purpose of working the mine. A committee of management was appointed, subject to the control of the adventurers in general meetings assembled, and certain rules were adopted for the government of the company, and new rules might be made at the general meetings of the company, not inconsistent with the Cost-Book System. By a resolution, duly passed at a general meeting, it was decided that the adventurers should only be at liberty to inspect the works on certain specified days. It was now contended, on the part of the applicant, that as it was the notorious and unqualified right of every shareholder in a mine of the class called "Cost-Book Mines" to

(*y*) *Newton v. Daly*, 1 F. & F. 26.

(*z*) *Dickinson v. Valpy*, 10 B. & C. 128; *Turner v. Hill*, 11 Sim. 1, and *Ricketts v. Bennett*, 4 C.B. 700; *Nicholls v. Diamond*, 23, L.J. Ex. 1;

*Wheal Lovell Mins. Co.* 1 Hall and T. 125; *Curling v. Flight*, 2 Phil. 614; *Owen v. Van Uster*, 10 C.B. 318; *Burmester v. Norris*, 6 Ex. 796.

(*a*) 18 Vic. c. 32, s. 22.

inspect the mine at all, or any reasonable times, at his own will and pleasure, this right could not be restrained or limited by the managers or local agents of the company, or the other adventurers. On the other side it was contended, that although such right might, as a general rule and practice, be exercised in the case of simple Cost-Book Companies, where the regulations of the company did not control or limit it, yet it might be, and in this case was in fact, specially excluded by reasonable regulations made by competent authority; and that where partners have agreed that the management of their affairs shall be entrusted to one or more of them, the superior courts of law will not interfere with them, unless they are clearly acting illegally, or in breach of the trust reposed in them. The Vice-Warden (Smirke), in delivering judgment, September, 1863 (*b*), said, he was bound to adopt the principles of the superior courts of equity, and that the legal effect of the constitution of this company was to displace the implied right of each adventurer to interfere directly and personally in the management of the mine, which was entrusted to a committee of five persons selected at the general meetings; the rest of the adventurers can only interfere indirectly by exercising their influence at the general meetings, and had no right, under the circumstances, to inspect the mine at pleasure. The application was therefore dismissed, with costs.

Inspection  
of mines.

Each adventurer is at liberty to transfer or relinquish the whole or any number of shares held by him, without the consent of his co-adventurers, according to the custom of the Stannaries; and upon such transfer or relinquishment being registered, the liability of such retiring adventurer ceases instantaneously, and for this reason, that the transfer or relinquishment is a legal dissolution of the partnership according to the custom of the Stannaries (*c*). Death or

Transfers  
and relin-  
quish-  
ments.

(*b*) See MSS. in Registrar's off. Truro.

(*c*) Fenn's case, 4 De G. M. & G. 285; Mayhew's case, 24 L.J. Ch. 353; Basset v. Reynolds, MSS. Stannary Court; Walker v. Bartlett, 25 L.J. C.P. 156, 268; Thomas v. Clark, 25

L.J. C.P. 309; 18 C.B. 662; Watson v. Eales, 26 L.J. Ch. 361; Bodmin United Mines, 26 L.J. Ch. 573; 23 Beav. 370; Birch's case, 2 De G. & J. 10; Lofthouse's case, ib. 69; 27 L.J. Bk. 1-4; Welsh Potosi Co. 27 L.J. Ch. 311.

Transfers  
and relin-  
quish-  
ments.

bankruptcy of any one of the adventurers does not dissolve the partnership (*d*).

In case of a transfer, whether in Cornwall or Devon (*e*), the transfer is not effectual till all calls due upon the shares are paid; but in the case of a relinquishment the calls need not be paid in order to make the relinquishment binding on the other adventurers, although it is understood to be the practice to refuse relinquishment as well as the transfer without payment of the arrears. No deed, or any form of transfer or relinquishment, is necessary in either county, although formerly it was assumed, on the dictum of Lord Tenterden, in the case of *Vice v. Anson* (*f*), that a transfer of shares must be by deed; but we think, after a careful perusal of the judgment in that case, that the opinion of Lord Tenterden was based on the supposition that shares in a mine was an interest in real estate within the Statute of Frauds, 29 Car. II. c. 3, and consequently that such an interest could only pass by the same instrument as was necessary to convey real estate, and that as a certificate of transfer did not pass any interest in land, it could not, therefore, be received in evidence; but shares in mines are not real estate, and, as the transfer of such shares do not pass any interest in the land, no deed is necessary. The transfer, on the authority of a subsequent case, might, indeed, be regarded as evidence of some other deed or instrument (*g*), and, as such, an admission that the shares had passed to the transferee. But whatever doubt might have existed, the whole question is now placed on a satisfactory footing, for not only has it been decided that mining shares are not interest in land within the 4th section of the Statute of Frauds, or of goods within the 17th section of that statute (*h*), but that a parol contract for the sale of shares in a Cost-Book Mine is sufficient, and need not be in writing (*i*).

(*d*) *Ricketts v. Bennett*, 4 C.B. 689; *Bentley v. Bates*, 4 Jur. 552; *Clements v. Hall*, 27 L.J. Ch. 349.

(*e*) *Welsh Potosi Lead Cy.* 27 L.J. Bk. 1 & 4; 27 L.J. Ch. 311.

(*f*) 7 B. & C. 409.

(*g*) *Toll v. Lee*, 4 Ex. 230.

(*h*) *Watson v. Spratley*, 10 Exch. 237; ante, pp. 268, 314.

(*i*) *Northey v. Johnson*, 19 L.T. 104; *Watson v. Spratley*, 10 Exch. 242; *Powell & Anr. v. Jessop*, 25 L.J. C.P. 199.



The transfer should be duly signed by the person desiring to cease to be an adventurer, as well as by the purchaser, and should contain the address of the purchaser (*j*), and the relinquishment must be signed by the relinquisher, and in either case the document had better be witnessed, and it must then be delivered or forwarded by post to the purser, or, if there is no purser, to the manager, secretary, or other officer of the company appointed in his stead, who is thereupon bound to register the transfer or relinquishment, as the case may be, in a proper book of the company kept for that purpose. A regular transfer or relinquishment is complete on its being duly forwarded to the purser or his substitute (*k*), even although the officer may refuse, and does not actually register it (*l*); so that, in either case, the liability as well as the interest of the transferor or relinquisher ceases, and the liability and interest of the transferee attach from the time of the signing of the document, if then duly forwarded to the proper officer of the company.

Transfers  
and relin-  
quish-  
ments.

A written transfer or relinquishment should clearly state the intention of the adventurer transferring or relinquishing his interest to cease to be an adventurer, and he must not afterwards hold himself out as an adventurer, or in any way interfere with the company's affairs, or he may be held liable for so doing (*m*). The case of *Toll v. Lee*, before referred to, decided that no stamp on a transfer was necessary; but by 23 & 24 Vic. c. 15, ss. 8-11, a stamp of 6d. is required on any note, instrument, or writing requesting or authorizing the purser or any officer of a mining company conducted on the Cost-Book System, to enter or register any transfer of any share or part of a share in any mine; and also on every notice to such purser or officer of any such transfer.

Stamps.

The following forms of transfer and relinquishment may be adopted:

(*j*) Convoc. 11 Chas. I. s. 5, Stan. Laws, p. 62.

(*k*) Sutton's case, 3 De Gex & S.

(*l*) Re Bodmin Mines, 26 L.J. Chan. 573.

(*m*) Re Bodmin United Mines, re Liddell & Others, 26 L.J. Ch. 570; Northey v. Johnson, 19 L.T. 104.

Form of  
transfer.

I do hereby for valuable consideration sell, assign, and transfer unto parts or shares of and in a certain mine or adventure called , situate in the parish of , in the county of , together with the like share or proportion of and in all engines, tools, tackle, materials, ores, halvans, moneys, and all other appurtenances thereto belonging, together with all dividends and profits in respect of the said part or share , and all interests, privileges, and advantages to be derived therefrom.

As witness my hand this day of one thousand eight hundred and

Witness.

I do hereby accept the said shares, subject to the same terms and conditions, rules and regulations, as the said held the same.

Witness.

To the Purser.

Form of  
relinquish-  
ment.

The relinquishment should be an absolute surrender of the shares into the hands of the company for the benefit of the other adventurers, and of all interest in the mine and the engines, machinery, and personal effects of and belonging to the mines; and it may then be in any form (n).

Creditors'  
lien.

All merchants, tradesmen, and other creditors of the company for goods supplied, labour bestowed, or personal services rendered in working the mine, have a tacit hypothec or lien on the plant, machinery, materials, and personal property of the mine. This customary right has been recognised by statute, and will be enforced by the Vice-Warden (o).

Lien on  
shares for  
costs and  
calls.

On the other hand, the company have a lien on the shares of every adventurer for contribution for costs and calls duly apportioned and allowed at the several meetings of the adventurers (p).

(n) Bodmin Mines, 26 L.J. Ch. 570. Laws, p. 108; 6 & 7 Will. IV. c.

(o) 18 & 19 Vic. c. 32, s. 11-14. 106, s. 18; 18 Vic. c. 32, s. 3.

(p) Convoc. 26 Geo. II.; Stan.

There is no custom to enable shareholders to agree amongst themselves that calls in arrears shall be considered debts due from defaulting shareholders to the purser, so as to enable the purser to sue the defaulting shareholder at law, consequently any such agreement is void; but the purser may proceed for the recovery of the calls in the Stannary Court (*q*).

Purser's authority to sue for arrears of calls.

Although formerly it was considered and has been the practice in some companies professing to be established on the Cost-Book System, to declare a forfeiture of all shares upon which the calls made thereon had not been paid within the stipulated time; there is no principle inherent in the Cost-Book System which will warrant any such practice. Lord Cranworth, in *Clarke v. Hart*, said the custom "was not shown, it might be almost a universal practice so to treat it in any particular deeds, but if it was to be established as a legal right in any particular case, it must be introduced into the deed" (*r*).

Custom to forfeit shares.

According to ancient custom, a miner could only be sued in the Stannaries Court (*s*); but this exclusive privilege has been taken away (*t*).

Privilege of a miner.

The term "miner," means not only a labouring man, but any person interested in mines, as merchants and tradesmen supplying goods and articles to a mine, adventurers, agents of mines, mineral proprietors, and all other persons deriving any profit from mines (*u*).

Meaning of the term "miner."

(*q*) *Hybart v. Parker*, 27 L.J. C.P. 120.

(*r*) *Stan. Laws*, pp. 21, 42; see *Norway v. Rowe*, 19 Ves. 143; *Prendergast v. Turton*, 1 Y. & C. N.C. 103, 13 L.J. 268 Ch.; *Stewart v. Anglo-Californian Gold Mines Cy.* 21 L.J. 393 Q.B.; *Watson v. Eales*, 26 L.J. Ch. 361; *Clarke v. Hart*, 27 L.J. Ch. 615, 6 H.L. Ca. 683.

(*s*) *Stan. Laws*, pp. 18, 137; *Charters of John & Edward* expounded, 50 Ed. III.; & 16 Car. I. c. 15, s. 4; 4 Inst. 232; *Resolu. of Judges*, 4 James, *Pearce's Stan. p.* 142.

(*t*) 9 & 10 Vic. c. 95, ss. 67, 141; 12 & 13 Vic. c. 101, s. 18; 15 & 16 Vic. c. 54; *Lewis v. Hance*, 11 Q.B. 921; *Newton v. Nancarrow*, 15 Q.B. 144; 19 L.J. Q.B. 314.

(*u*) For the other Cornish customs, see *Year Book*, H. 4, f. 5, A. B. pl. 6, *Bracton*, 271, a lib. 4, tr. 3, c. 13, s. 2, edit. 1569; *Chapman v. Chapman*, *March's Rep.* of case 82, p. 54; *Pearce's Stan. Laws*; *Smirke's Stan.*; *Stannary Laws* published at Truro, 1752.



## SOMERSETSHIRE.

*Ancient customs extinct—refuse of ancient workings—are the present operations of the miners within the laws of mining or quarrying?*

Ancient  
customs  
extinct.

THE king's forest of Mendipp, in Somersetshire, was in ancient times famous for its production of lead; but mining operations have long since ceased to be carried on there, although, recently, some fresh attempts have been made for ascertaining the value of its mineral wealth. When the mines were in operation, local laws and customs were established for their government (*v*), but those laws and customs must now be considered extinct, and should mining be revived, new laws must be made to suit the requirements of the district. In the absence of local laws, the general law of the land must prevail.

Mining or  
quarrying.

We should observe, that lately one or two companies have been formed for extracting the lead from the heaps of refuse on the surface left there from the ancient workings, and for making the same merchantable; but the operations of these companies being connected with the surface, with the exception of some pits which have been made by the removal of the refuse, do not fall so much under the laws of mining in general as the laws relating to quarries. In some cases it may be difficult to decide, whether the present operations of the miner in this district amount to what is legally termed "mining" or "quarrying." Mining usually signifies the working for minerals without disturbing the surface; whereas quarrying is a disturbance of the surface, and a laying open of the material beneath the surface. The difference between mining and quarrying has been already pointed out in this work (*w*).

(*v*) Houghton's Compleat Miner, London, 1687; Pettus on Royal Mines, p. 82.

(*w*) Ante, pp. 143-150.

## GLOUCESTERSHIRE.

## FOREST OF DEAN AND HUNDRED OF ST. BRIAVELS.

*Ancient customs indefinite. Acts of Parliament—1 Charles I. c. 16—20 Charles II. c. 3—48 Geo. III. c. 72—59 Geo. III. c. 86—10 Geo. IV. c. 50—1 & 2 Will. IV. c. 12; 3 & 4 Will. IV. c. 38; 4 & 5 Will. IV. c. 59—commissioners appointed—their reports. 1 & 2 Vic. cc. 42, 43—rights of the Crown and the Free Miner defined—new commissioners appointed—commissioners' award to be in triplicate.*

*COAL MINES.—Titles to existing Gales confirmed—applications for Gales before 9th April, 1832, granted by Commissioners—extent of Gales defined—rules and regulations for working Gales prescribed—union of Gales—special provisions—reddendum on Gales—Lord Seymour v. Morrell—dispute as to minimum or dead rent.*

*IRON MINES.—Title to existing Gales confirmed—applications for Gales made prior to 9th April, 1832, granted by commissioners—limits to Gales, and rules and regulations for working them prescribed.*

*QUARRIES.—Title to existing Quarries confirmed, their limits defined, and rules and regulations for working them prescribed.*

*COAL AND IRON MINES AND QUARRIES—customs to cease on completion of awards—Gaveller's duties—recovery of Galeage rents—Commissioners of Woods and Forests may grant Leases—claims of the Lord of the Manor of Blakeney disputed and overruled—Prosper free level colliery—meaning of "level." 24 & 25 Vic. c. 40—awards of Commissioners declared absolute and indefeasible—Galee's interest in real Estate—conditions of certain leases—personal responsibility of persons in possession—Gaveller's powers enlarged. Powers of Commissioners of Woods and Forests to grant Leases, and Licenses, enlarged. Compensation respecting surface damage—new provisions respecting Gales, labourers' cottages, and unlawful trespasses.*

THE Royal Forest of Dean and Hundred of St. Briavels are situate within that part of Gloucestershire which is bounded by the rivers Severn and Wye (a). The soil and minerals belong to the crown, but for many centuries peculiar privileges in and beneath the surface had been claimed by certain persons resident in the district denominated "Free Miners." Those privileges eventually ripened into customs which among other things conferred upon the "free miner" a right to work the mines of the forest subject to the payment of an annual galeage rent or duty to the crown. In ancient times the practices of the free miners were regulated by a court or jury of the miners, who met in a house called the Speech-house, which is situated in a very beautiful romantic part of the forest, and is now used as an inn, a

Ancient  
customs.

(a) See History of the Forest, by H. G. Nicholls.

room being still appropriated to the miners, where, however, they have now no other privilege than that of attending there and paying their rents to the officers of the crown. The court has for some time fallen into disuse, but the records and other proceedings of the court, extending over a period of eighty-six years, from 1668 to 1754, have been preserved, and are now deposited in the office of the Woods and Forests (*b*). These records illustrate the ancient usages and practice of the miners, and treat chiefly of the following subjects :

1. Rights and privileges of free minership and the concessions made to foreigners. 2. The time and mode of serving apprenticeships, the renting of land and keeping house; these being essentials to the privilege of working the iron or coal. 3. Raising of money for the relief of miners who are maimed or hurt, and for preserving their privileges. 4. The protection of old workings. 5. Penalties.

Customs  
indefinite.

From a perusal of these documents it will appear that the rights of the crown and the customs of the miners were very indistinctly defined, and totally inadequate to the proper or effectual working of the mines. The crown asserted a right to control the erection of engines and other machinery, without which the most valuable coal could not be raised to the surface; the miner sold or assigned *gales* to persons who were foreigners, with a very questionable title, and had for some time been working the mines beyond a depth authorized by the customs. These and similar irregularities required the interference of the Legislature, and so far back as the reign of Chas. I. an Act was passed for settling the bounds and limits of the forest (*c*); and in the 20th year of Chas. II. (cap. 3), another Act was passed, entitled "An Act for the increase and preservation of timber within the Forest of Dean," under and by virtue of which Act it was declared that every gift, grant, estate, or interest taken or obtained of or in the enclosure or waste of the said forest, or of or in any of the mines or quarries, or

1 Chas. I.  
c. 16.

20 Chas.  
II. c. 3.

(*b*) See Houghton's Compleat Miner, London edit. 1687, which contains the Laws and Customs of the Miners in the Forest of Dean in 41 Articles, together with the Orders and Rules of the

Court of St. Briavels; Smirke's Stan. p. 128-132; Doe. d. Thomson v. Pearce, 2 Peake, 242.

(*c*) 1 Chas. I. c. 16.



of or within the said enclosure, or any part thereof, should ipso facto be null and void. In the 48th year of the reign of Geo. III. another Act was passed, whereby it was again enacted that all gifts, grants, or any other estate or interest taken or obtained of or in the said enclosures of the forest should be void (*d*); and in the same reign another Act was passed, which provided for the better collection and recovery of the gale rents in the forest (*e*). By 10 Geo. IV. c. 50, being an Act to consolidate and amend the laws relating to the Royal Woods and Forests, all previous Acts relating to His Majesty's Woods and Forests, so far as they are inconsistent with or repugnant to the provisions of that Act, are declared to be void, and by section 100 power is given to inquire into unlawful enclosures, purprestures, encroachments, or trespasses. In the reign of Will. IV. the privileges of the free miners on the one hand, and the rights of the crown on the other, had become so uncertain that it was felt necessary to apply again to Parliament; the result was that an Act was passed for ascertaining the boundaries of the forest, and for inquiring into the rights and privileges claimed by the free miners of the hundred of St. Briavels, with power to appoint commissioners to examine and report thereon (*f*). Commissioners were appointed (*g*), and on the 7th July, 1832, they presented their first report, which related to the constitution, power, jurisdiction, and practice of the court of St. Briavels, the condition of the prison belonging thereto, the treatment of and provision made for the persons confined therein, and the general management and conduct of the said prison. On the 1st May, 1834, the commissioners made another report, which related to the boundaries of the forest, and of the lands of His Majesty's subjects within the same, and the rights and interests of persons occupying or claiming to be interested in lands or tenements within the bounds of the said forest; the origin or alleged origin of such rights and interests, and also the dates, value, and other particulars respecting pur-

48 Geo. III.  
c. 72.

59 Geo. III.  
c. 86.

10 Geo. IV.  
c. 50.

1 & 2 Will.  
IV. c. 12.

Commissioners  
appointed;  
their re-  
ports.

(*d*) 48 Geo. III. c. 72.

(*e*) 59 Geo. III. c. 86.

(*f*) 1 & 2 Will. IV. c. 12, extended  
by 3 & 4 Will. IV. c. 38; 4 & 5 Will.  
IV. c. 59.

(*g*) Commission dated 21st Jany.  
1832.

prestures, encroachments, and trespasses in and upon the soil of His Majesty within the said forest. On the 13th June, 1835, the commissioners made a third report on the expediency of erecting and forming into one or more parishes or uniting to and consolidating with any adjoining or other existing parish the said Forest of Dean, and the lands lying within the perambulation and regard of the said forest, or of such parts of the said forest and lands respectively as were extra-parochial. On the 25th August, 1835, the commissioners made a fourth report relating to the rights and privileges of the free miners, and in this report the commissioners admit that the origin and extent of those rights and privileges were involved in obscurity, but that certain rights and privileges of free miners for working the forest mines did exist and might be traced so far back as the reign of Edward I. On the said 25th day of August, 1835, the commissioners made a fifth and final report, which related to certain claims of common of pasture within the bounds of the forest, and the rights and interests of persons claiming to be owners of, or to have a right to open or work quarries, and the origin whether by grant, custom, or otherwise of such several rights and interests.

1 & 2 Vic.  
c. 42.

Subsequent to the reports and in pursuance of the recommendations of the commissioners therein contained, two Acts of Parliament were passed under and by virtue of which the rights of the crown and the subject respectively are now to be considered as established. By the 1 & 2 Vic. c. 42, entitled "An Act to empower the Commissioners of Her Majesty's Woods, Forests, and Land Revenues to confirm the Titles to and to grant Leases of Encroachments in the Forest of Dean in the county of Gloucester," the before-mentioned Act of 20 Car. II. c. 3 is recited, and it is there stated that many encroachments, notwithstanding the provisions contained in the Act of King Charles, had been made and were being continued in the waste lands of the forest, and after reciting the before-mentioned Act of 1 & 2 Will. IV. c. 12, and enacting that the second before-mentioned report of the commissioners should be deposited in the office of Woods and Forests, the

said Act of 1 & 2 Vic. c. 42, gives to the subject a title to some of the encroachments (*h*), authorizes the Commissioners of Woods and Forests to grant leases of other encroachments (*i*), and in certain cases to sell the fee-simple thereof (*j*); and other provisions are made in reference to such leases and sales (*k*). The before-mentioned Act of 10 Geo. IV. c. 50, and especially the said 100th section thereof before referred to, so far as regards purprestures in and upon the said Forest of Dean, is repealed, but all the provisions of that Act as regards encroachments or trespasses made after the passing of the said Act of 1 & 2 Vic. c. 42 to be made or continued in or upon the said forest, are to remain and be in full force (*l*). Further provision is made for inquiring into unlawful enclosures, trespasses, and encroachments (*m*). The before-recited Act of 20 Car. II. c. 3 is not to be repealed, except in the case of encroachments provided for by the 18th section.

By the 1 & 2 Vic. c. 43, the crown is declared to be entitled—1. To the soil of the forest, and to all mines and minerals within or under the forest subject to certain alleged rights of the commoners. 2. To divers enclosures within and upon the said forest whilst so enclosed freed from all claims and demands of other persons whatsoever. 3. To all mines and minerals within or under any part of the lands of the hundred of St. Briavels, save and except such mines and minerals as had at any time been granted by the crown to the subject, and having been so granted had not afterwards become re-vested in the crown by purchase or otherwise. On the other hand, the ancient privileges and customs of the free miners of the hundred of St. Briavels to open mines and quarries in the open lands of the forest, and also to open mines in all lands within the said hundred of St. Briavels except in some privileged places specified in the Act, and to work the said mines and quarries, is recognised by the Act (*n*).

1 & 2 Vic.  
c. 43.

Rights of  
the crown.

Rights of  
the free  
miner.

(*h*) Sec. 3.

(*i*) Secs. 4-7.

(*j*) Sec. 8.

(*k*) Secs. 9-18.

(*l*) Sec. 14.

(*m*) Secs. 15-17.

(*n*) See *Doe d. Thompson v. Pearce*,  
2 Peake, N.P. 242.



New commissioners appointed.

The Act then proceeds to appoint new commissioners (*o*), under the title of the "Dean Forest Mining Commissioners," whose duties were to consist chiefly—1. In ascertaining what persons were, or had claimed to be at the time of the passing of the Act, in possession of or entitled to gales for coal or iron mines within the said hundred, or stone quarries within the said forest, or of any pits, levels, or other works made by virtue of gales for the purpose of working the coal and iron mines of the said hundred, or of any estate or interest therein; and then to make their award in reference to the said matters respectively (*p*). 2. To make plans (*q*) of the said gales, pits, levels, works, and quarries. 3. To prepare and settle rules, orders, and regulations for the future working of the mines and quarries. Divers other powers and authorities were given to and vested in the commissioners by the said Act. The commissioners accordingly proceeded and at length completed their labours, and in due course made their award and plans, and issued the requisite rules and regulations in pursuance of the Act. The award conformably to the Act was made and signed in three parts (*r*); the first part relates to the coal mines of the hundred of St. Briavels, and is dated 8th March, 1841; the second to the iron mines of the said hundred, and is dated 20th July, 1841 (*s*); the third to the quarries, and is dated 24th July, 1841. Each part of the award in pursuance of the Act is signed in triplicate and lodged in the following three places—viz. in the office of Lands Revenue Records and Enrolments; with the Clerk of the Peace for the county of Gloucester; and with the gaveller or deputy-gaveller of the Forest of Dean; at either of which places they may be seen and copies thereof obtained upon payment of certain fees, specified in the Act (*t*).

Commissioners' award in triplicate.

COAL MINES.

The first part of the award of the commissioners appointed under the Act of 1 & 2 Vic. c. 43 proceeds to state: "Now, therefore, know ye that we, the above-named

(*o*) 1 & 2 Vic. c. 43, ss. 1, 13.

(*p*) Secs. 24, 39.

(*q*) Sec. 27.

(*r*) Secs. 32, 33.

(*s*) Sec. 32.

(*t*) See Award of Coal and Iron Mines, with notes, by Sopwith (1841), and Award relating to Quarries published by Commissioners in 1859; post, p. 401.

Thomas Sopwith, John Probyn, and John Buddle (the Dean Forest Mining Commissioners), do by this our award, in writing under our hands and seals, ascertain and determine that the several persons hereinafter named were, at the passing of the said Act, either as free miners or as claiming through or under free miners, or as lessees of free miners, in possession of or entitled to the several hereinafter named gales, for the purpose of working the coal mines of the said hundred of St. Briavels, that is to say."

Then follow the names, description, and addresses of the said persons seriatim, with notes attached to each showing in what capacity their claims were made, whether as free miners, or as assignees claiming through or under the free miners, or as lessees of the said free miners, together with the nature and extent of their respective estates or interests therein" (*u*).

Title to existing gales confirmed.

The award further adds the applications of several persons which had been made for gales prior to the 9th April, 1832 (*v*), but which had not been granted, and what, if any, steps had been taken by the applicant to work the said gale, and the said commissioners did then declare (*w*) that "inasmuch as it appears to us that such last-mentioned gales can be granted without injury or detriment to any legally existing gales, pits, levels, or works, which were granted previously to the said 9th day of April, 1832, and can be reasonably proceeded with, and without injury to the reasonable claims, or legal or customary powers, of parties lawfully possessed of or entitled to such gales, pits, levels, or works, contiguous to the sites of the said gales, for which applications have been so made and acted upon as aforesaid: Now therefore, we do hereby accordingly in pursuance of the powers in the said Act (*x*) contained, award, sanction, and confirm the said gales hereinbefore mentioned, and which have been applied for as aforesaid. And further, we do hereby declare and award that no other applications for gales have been made by free miners since

Application for gales made before 9th Apr. 1832, granted by the commissioners.

(*u*) Sopwith, pp. 41-59.

(*v*) See Sopwith, p. 59, and sec. 39 of 1 & 2 Vic. c. 43.

(*w*) Sopwith, pp. 65-70.

(*x*) 1 & 2 Vic. c. 43. s. 39.

the 9th day of April, 1832, which have been acted upon as if they had been granted, and whereon works have been erected and proceeded with under such applications at a considerable expense, and which can be granted, or reasonably proceeded with, without injury or detriment to contiguous works. And which said gales hereinbefore mentioned (including the last-mentioned gales hereby awarded, sanctioned, and confirmed), and the pits, levels, or works severally made in pursuance thereof, we the said commissioners have described in the 1st schedule hereto annexed (*y*), and we have set out definite metes and bounds thereto, and we have caused plans to be made describing the situation of the said gales respectively, as far as the same could be conveniently ascertained; and which said plans are also hereunto annexed, and are marked and numbered respectively as follows (that is to say): As to the Coleford High Delf Vein A 1 to A 16. As to the Churchway High Delf Vein B 6, B 7, B 8, B 10, B 11, B 12, B 14, and B 16. As to the Rockey Vein C 6, C 7, C 8, C 10, C 11, C 12, C 14, and C 16. And as to the Park End High Delf or Lowrey Vein D 6, D 7, D 8, D 10, D 11, D 12, D 14, and D 16. And we do hereby award, direct, ascertain and determine that the said gales, pits, levels, or works, shall be of the extent, and bounded as shown and described in the said plans, and 1st schedule, and that there shall be paid to Her Majesty, her heirs, and successors, in respect of such gales, pits, levels, or works respectively, the several rents, royalties (*z*), or tonnage duties set forth and defined in the said 1st schedule, and at the times and in manner therein mentioned. And further, that the mines and works of such gales shall be continued and worked in the manner and according to the directions contained in the general rules (*a*), orders, and regulations framed by us in pursuance of the powers in the said Act contained, and comprised in the 2nd schedule hereto annexed (*b*). And whereas it appears to us

Extent of  
gales de-  
fined.

Rules and  
regula-  
tions.

(*y*) See Schedule to award by Sopwith, pp. 71-167; 1 & 2 Vic. c. 43, ss. 24, 27.

(*z*) 1 & 2 Vic. c. 43, ss. 41, 44, 46, 47.

(*a*) 1 & 2 Vic. 43, ss. 24, 29, 54, 55, 56.

(*b*) See rules and regulations in Schedule to award, Sopwith, pp. 167-173; 1 & 2 Vic. c. 43, s. 24.



the said commissioners, that the said gale, called Newcastle, <sup>Union of gales.</sup> whereof Sarah Whitehouse is the owner of one moiety, is so situated with regard to other adjoining or contiguous gales and pits of the said Edward Protheroe, the owner of the other moiety of the said gale, called Newcastle, that it cannot be separately set out as to metes and bounds, or be separately wrought without great loss to the parties working the same, or without producing great injury and detriment to the adjoining or contiguous gales and pits of the said Edward Protheroe: We do therefore hereby award that the said Newcastle Gale shall be united (*c*) with the adjoining or contiguous gales of the said Edward Protheroe. And in consideration thereof, he the said Edward Protheroe has already paid to the said Sarah Whitehouse the sum of £200, which we have directed should be paid to her as a compensation for her said moiety. And we ascertain and determine that the several persons named in the 3rd schedule to this award were at the passing of the said Act in possession of licenses to erect buildings and machinery on the soil of the said forest, for the purpose of facilitating the working of the said coal mines. And we have in the said 3rd schedule (*d*) made a description of the same, specifying the time when such licenses were granted, and the term for which they were granted, and the annual rents or other payments thereby made payable to or for the use of Her Majesty for or in respect of such (*e*) licenses respectively. And we find it alleged before us that since the passing of the aforesaid Act, the said Thomas Bennett has purchased (*f*) the shares of the said James Bennett in the 'Nelson,' gale or work, and has thereby become the sole owner thereof; and that the said Thomas Bennett and James Bennett have purchased the several shares and interests of the said Thomas Gardiner and John and Letitia Bennett, Giles Griffiths, and Thomas Court in the said 'Independent or Churchway Gale,' or work, and that they have thereby become the sole owners thereof, and

Special provisions respecting some of the gales.

(*c*) 1 & 2 Vic. c. 43, s. 28.

(*d*) See Schedule, Sopwith, p. 174.

(*e*) 1 & 2 Vic. c. 43, ss. 43, 44, 65.

(*f*) 1 & 2 Vic. c. 43, s. 40, as to all sales.

Special provisions respecting some of the gales.

that they are now entitled thereto in equal undivided moieties; and that the said John Harris has purchased the several shares and interests of the said Arabella Holt, John Gagg, William Gagg, Ursula Anna Maria Williams, and Thomas Ridge, in the said 'Strip-and-at-it,' gale or work, whereby he has become the sole owner thereof; and that the said James Cowmeadow has purchased of the said Moses Teague, since deceased, the 'Cinderford Bridge Water Pit,' gale or work, and we find it further alleged before us, that the said gales called 'Pike Pit and Fancy Pit,' the property of William Todd, are subject to a mortgage (g) to the said Edward Protheroe the elder; that the said gales called 'Resolution,' 'Safeguard,' 'Walls' End,' and 'New London,' the property of the said William Todd and Robert Todd, are also subject to a mortgage to the said Edward Protheroe the elder; that the said gale called 'Speculation Level,' in the possession of the said James Morrell and Robert Morrell, is subject to a claim by the representatives of the late Mr. George White, of Tripennet, for the sum of £390 and an arrear of interest; that the said gale called 'Pillowell Level,' also in the possession of the said James Morrell and Robert Morrell, is subject to a claim by Elizabeth Cheese as a mortgagee; that the shares of the said David Davies in the said gale called 'Catch Can,' are subject to a mortgage to Mr. James Cockell, and to a claim made by the said James Morrell and Robert Morrell under an agreement to mortgage; that the said gale called 'Brandicks New Level,' the property of the said William Cook and William Packer, is subject to a claim by Samuel Barton, under an agreement for a lease thereof; that the said gale called 'Worrall Hill Deep Level,' the property of the said William Lewis, is subject to a mortgage to Peter Teague, of Coleford, and Thomas Rosser; that the said work called 'Arthur and Edward Colliery,' is subject as to 11-12ths thereof, the property of the said Thomas Butler, to a mortgage to John Posford Osborne; that some interest in the said gales called 'Cooper's Level,' 'Quidchurch Engine,' 'Old Orles,' and

(g) 1 & 2 Vic. 43, s. 40, as to all mortgages.

‘Meerbrook High Delf,’ is claimed by the said William Crawshay and Moses Teague; that the said gale called ‘Royal Colliery,’ in the possession of the said James Brooks and Isaac Preest, is subject to a claim for £60, payable to Mrs. Jane Turner, of Coleford aforesaid, and another claim of £60 to Mr. Benjamin Johnstone or his representatives; that the said gales called ‘Oaken Level,’ and ‘Churchway Level,’ or parts thereof, are subject to a mortgage to William Edward Spencer; that the shares of the said David Davies in the said gales called ‘Long Looked For,’ and ‘Newman Shropshire, or Horse Engine Level,’ and ‘Branches from Ditto,’ are subject to a mortgage to the said James Morrell and Robert Morrell, and that the share of the said William James in the said last-mentioned gales is subject to a mortgage to William Stephens; that the said gales called ‘Independent or Grove Engine,’ and ‘As You Like It,’ the property of Philip Morse, John Morse, William Cook, William Packer, David Davies, and Richard Morse are subject to a lease (*h*) to the said Edward Protheroe the elder; that the said gales called ‘Union and Cannop Engine,’ are subject to an agreement (*h*) for sale thereof to Mary Ann Godwin and William Lawrence Bevir; and that the said gales called ‘Foxes Bridge,’ and ‘Great Kemsley Water Pits,’ the property of the said William Montague and Moses Teague, are subject to a claim by the said Edward Protheroe under an agreement to pay him a royalty thereon. In witness whereof, we, the said commissioners, have hereunto set our hands and seals the 8th day of March, 1841.”

In the assignment of the gales to the respective claimants, the rents to be paid in respect of each varied in amount, but a dead or minimum rent was imposed on each. The terms of the *reddendum* were as follows (*i*): “Rendering and paying therefore to Her Majesty, her heirs and successors, up to Midsummer next, the former galeage rent, and thenceforward for all such coal as shall be brought out the sum of 2d. per ton as tonnage, such tonnage to be paid

Special provisions respecting some of the gales.

*Reddendum of gales.*

(*h*) As to all leases and agreements, (i) Sopwith, pp. 71, 72.  
see 1 & 2 Vic. c. 48, s. 40.



on the 24th day of June and 25th day of December in every year. And further, so working the said colliery, as that there shall be wrought and gained in every year, from Midsummer next, a quantity of not less than 1800 tons. Provided that if, by any reason whatsoever, in any one year no coal shall be got in respect of the said colliery, or the tonnage-rent to be paid for coal got within the year, under the aforesaid reservation, shall not amount to £15, then either the full sum of £15 or such other sum, as together with the amount paid or to be paid for tonnage-rent in respect of coal got within the year (as the case shall be) will make up the full sum of £15, shall be made up and paid to Her Majesty, her heirs and successors, on the 24th day of June in every year."

Lord Seymour v.  
Morrell.

This *Reddendum* clause gave rise to the important case of Lord Seymour v. Morrell, which was tried at the Gloucester Summer Assizes, 1850, when the question was raised whether the commissioners who were appointed under the 1 & 2 Vic. c. 43, had power under that Act to adjudge any galeage rent to be payable for coals not actually worked; in other words, whether there should be a dead or minimum rent payable on gales granted by the crown if no coals were raised (*j*).

Dispute as  
to mini-  
mum rent.

For the crown it was contended that, if the Act did not authorize such dead or minimum rents, the lessees need never work the coal except at their own will and pleasure, and not only not work it themselves, but exclude all the rest of the free miners in the forest who might possibly be quite willing to work the coal, and thus injure the public as well as the crown; and the 29th, 30th, and 41st sections of the Act were particularly relied upon. For the free miners it was contended, that the commissioners had only power to impose a rent on coal actually worked, and that, therefore, the free miners were not bound to pay while the mine was not worked (*k*). On the case coming before the Queen's Bench in May, 1851, the crown further relied upon the 24th, 29th, 34th, 37th, 43rd, and 44th

(*j*) See manuscript Report of case, pp. 8, 25. (*k*) MS. Rep. p. 28.

sections of the Act (*l*) ; and for the miners it was admitted that there was power for fixing the quantity to be raised and the amount to be paid in respect thereof. Lord Campbell then said, "The counsel for the defendant—a free miner—having very properly conceded what he thought could not be denied, I think he is out of court. If there were the power of fixing the quantity to be got every year from the mine, and of saying how much was to be paid in lieu of this, the parties were merely expressing what otherwise would be implied." Patterson, J., said : "The 24th section of the Act seemed to give them power, by their award, to direct how the coals shall be worked ; and, as to the 41st section, I confess that the 'fifth man' weighs a good deal with me. It seems to me the dead rent is really in lieu of the fifth man." Judgment was, therefore, given for the crown, and dead or minimum rents were declared to be payable under the Act.

The second part of the award (after reciting the said Act of 1 & 2 Vic. c. 43, and the partial award of the coal mines) (*m*), proceeds as follows : "Now, therefore, know ye that we, the above-named Thomas Sopwith, John Probyn, and John Buddle, the Dean Forest Mining Commissioners, do by this our award, in writing under our hands and seals, ascertain and determine that the several persons hereinafter named were, at the passing of the said Act, either as free miners, or as claiming through or under free miners, or as lessees of free miners, in possession of, or entitled to the several hereinafter named gales, for the purpose of working the iron mines of the said hundred of St. Briavels, that is to say (*n*)—then follow the names, descriptions, and addresses of the said persons seriatim, with notes attached to each, showing in what capacity their claims were made, whether as free miners, or as assignees claiming through or under the free miners, or as lessees of the said free miners, together with the nature and extent of their respective estates or interests therein (*o*). The award further adds the applications of several persons

IRON  
MINES.

Existing  
gales con-  
firmed.

(*l*) MS. Rep. p. 82.

(*m*) Ante, p. 391.

(*n*) Sopwith, p. 178.

(*o*) Sopwith, p. 178.

Applica-  
tions for  
gales made  
before 9th  
Apr. 1832,  
granted by  
commis-  
sioners.

which had been made for gales prior to the 9th April, 1832 (*p*), and what, if any, steps had been taken by the applicant to work the said gale, and the said commissioners did then declare that (*q*), "Inasmuch as it appears to us that such last-mentioned gales can be granted without injury or detriment to any legally existing gales, pits, levels, or works, which were granted previously to the said 9th day of April, 1832, and can be reasonably proceeded with; and without injury to the reasonable claims or legal or customary powers of parties lawfully possessed of or entitled to such gales, pits, levels, or works, contiguous to the sites of the said gales for which applications have been so made and acted upon as aforesaid. Now, therefore, we do hereby accordingly, in pursuance of the powers in the said Act contained (*r*), award, sanction, and confirm the said gales hereinbefore mentioned, and which have been applied for as aforesaid. And further, we do hereby declare and award, that no other applications for gales have been made by free miners since the 9th day of April, 1832, which have been acted upon as if they had been granted, and whereon works have been erected and proceeded with under such applications, at a considerable expense, and which can be granted or reasonably proceeded with without injury or detriment to contiguous works. And which said gales hereinbefore mentioned (including the last-mentioned gales hereby awarded, sanctioned, and confirmed), and the pits, levels, or works severally made in pursuance thereof. We, the said commissioners, have described in the first schedule hereto annexed, and we have set out definite metes and bounds thereto, and we have caused plans to be made describing the situation of the said gales respectively, as far as the same could be conveniently ascertained, and which said plans are also hereunto annexed, and are marked respectively as follows, that is to say: A, B, C, D, E, F, G, H, I, J. And we do hereby award (*s*), direct, ascertain, and determine, that the said gales, pits, levels, or works, shall be of the extent and bounded as

(*p*) Sopwith, p. 182.

(*q*) Sopwith, p. 183.

(*r*) 1 & 2 Vic. c. 43, ss. 24, 39.

(*s*) 1 & 2 Vic. c. 43, ss. 24, 27.



shown and described in the said plans and first schedule, and that there shall be paid, to Her Majesty, her heirs and successors, in respect of such gales, pits, levels, or works respectively, the several rents, royalties (*t*), or tonnage duties, set forth and defined in the said first schedule (*u*), and at the times and in manner therein mentioned. And further, that the mines and works of such gales shall be continued and worked in the manner and according to the directions contained in the general rules (*v*), orders, and regulations framed by us in pursuance of the powers in the said Act contained, and comprised in the second schedule hereto annexed (*w*). And we ascertain and determine, that the person named in the third schedule to this award was, at the passing of the said Act, in possession of a license to erect buildings and machinery on the soil of the said forest, for the purpose of facilitating the working the said iron mines. And we have, in the said third schedule (*x*), made a description of the same, specifying the time when such license was granted, and the term for which it was granted, and the annual rent or other payment thereby made payable to or for the use of Her Majesty, for or in respect of such license. In witness whereof we, the said commissioners, have hereunto set our hands and seals the 20th day of July, 1841.”

Limits of gales.

Rules and regulations.

The question respecting minimum or dead rents payable on gales has been already discussed (*y*).

The third and last part of the award, after reciting the before-mentioned Act of 1 & 2 Vic. c. 43, and the partial awards relating to the coal (*z*) and iron (*a*) mines, proceeds as follows: “Now, therefore, know ye, that we, the above-named Thomas Sopwith, John Probyn, and John Buddle (the Dean Forest Mining Commissioners), do, by this our award, in writing under our hands and seals, ascertain and determine that the several persons hereinafter named were,

QUARRIES.

(*t*) 1 & 2 Vic. c. 43, ss. 42, 46, 47.

(*x*) See Schedule, Sopwith, p. 209.

(*u*) See Schedule, Sopwith, p. 186;  
also sec. 27 of 1 & 2 Vic. c. 43.

(*y*) Ante, p. 398.

(*v*) 1 & 2 Vic. c. 43, s. 24.

(*z*) Ante, p. 392.]

(*w*) See Rules and Regulations,

(*a*) Ante, p. 399.

Sopwith, p. 202.

Limits of  
gales.

at the passing of the said Act (either as free miners or as claiming through or under free miners), in possession of or entitled to the several hereinafter-named gales, for the purpose of working the quarries of the said forest, that is to say"—then follow the names, descriptions, and addresses of the several persons so entitled to the gales for working the quarries, with notes, showing in what capacity their claims were established (*b*). The award then proceeds as follows (*c*): "And which said gales hereinbefore mentioned, and the quarries severally made in pursuance thereof, we, the said commissioners, have described in the first schedule hereto annexed (*d*), and we have set out definite metes and bounds thereto, and we have caused plans to be made describing the situation of the said gales respectively, as far as the same could be conveniently ascertained; and which said plans are also hereunto annexed, and are marked respectively as follows (that is to say:—A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, A A, B B, C C, and D D: And we do hereby award, direct, ascertain, and determine, that the said gales and quarries shall be of the extent and bounded, as shown and described in the said plans and first schedule, and that there shall be paid to Her Majesty, her heirs, and successors, in respect of such gales respectively up to Michaelmas next, the former galeage rents and thenceforward for every quarry contained in this award, where the same shall not exceed twenty yards in length (which length of twenty yards we determine to be the extreme limit of a single quarry), the sum of three shillings and fourpence per annum, and for every additional length, whenever the same shall extend to ten yards, a further rent calculated after the rate of three shillings and fourpence per annum for every twenty yards, such rents to be paid and payable on the twenty-ninth day of September in each and every year: And further, that the quarries of such gales shall be continued and worked in the manner and according to the directions contained in the general rules, orders, and regu-

Rules and  
regula-  
tions.

(*b*) See Award published by Commissioners, pp. 2-18.

(*c*) See Award, p. 19.

(*d*) Page 20 of Award.

lations framed by us in pursuance of the powers in the said Act contained and comprised in the second schedule hereto annexed. In witness whereof, we, the said commissioners, have hereunto set our hands and seals the 24th day of July, 1841" (*e*).

### COAL AND IRON MINES AND QUARRIES.

By the Act 1 & 2 Vic. c. 43, it is provided that "from and after the execution of the award of the said commissioners hereby appointed specifying such rules and regulations as aforesaid, all and every the customs respecting the said mines, minerals, and quarries in the said Forest of Dean, and also in the said hundred of St. Briavels, and the rights and privileges of or claimed by the said free miners, other than such as are or may be confirmed by this Act, or any award specifying such rules and regulations as aforesaid, shall absolutely cease" (*f*). Customs to  
cease

The gaveller is empowered to grant gales to free miners in the order of their application (*g*), and all such grants are to be entered in the gaveller's books and enrolled in the office of Land Revenue Records and Enrolments (*h*), and assignments of gales and all transfers of leases of quarries are to be entered in the books of the gaveller or deputy-gaveller (*i*), but the gaveller is not to grant any gale which he considers would be likely to interfere with any existing gale, pit, level or work, or which would not otherwise be well adapted for obtaining the mineral (*j*), and no free miner is to be entitled to have more than three gales granted at a time (*k*). Gaveller's  
duties.

The powers of taking, suing for, or recovering of the gale-age rents and payments in force at the time of the statute, by virtue of any statute, custom, grant, or otherwise, are to continue in force; and the same powers so far as they are applicable are to apply to any galeage rent, royalty, tonnage, duty, or other payment then payable or afterwards to become Recovery  
of galeage  
rents, &c.

(*e*) Page 46 of Award; 24 & 25  
Vic. c. 40, s. 18.

(*f*) Sec. 31.

(*g*) Sec. 60.

(*h*) Sec. 57.

(*i*) Sec. 58.

(*j*) Sec. 62.

(*k*) Sec. 61.



payable under the Act (*l*), and provision is made for recovery of penalties and forfeitures inflicted or authorized to be enforced under the Act, in a summary way before justices of the peace with power of appeal (*m*); but no action or suit is to be commenced against the commissioners appointed under the Act without giving twenty-one days' notice, nor after sufficient amends have been tendered to the aggrieved party, nor after three calendar months next after the act committed for which such suit or action shall be brought (*n*).

Commissioners of Her Majesty's Woods and Forests may grant leases.

The Commissioners of Her Majesty's Woods and Forests have power to grant leases of any quarries and also leases to dig and get clay or sand off and from any of the open and waste lands for any term not exceeding twenty-one years, on such terms as they may deem expedient, and every such lease as last mentioned is to be enrolled (*o*).

Claims of lord of the manor of Blakeney disputed and overruled.

A question has arisen under the 85th section of the said Act 1 & 2 Vic. c. 43, which section reserved the rights of the lord of the manor of Blakeney (Mr. Ambrose) and his heirs to grant gales for quarries and exact fees and rents in the bailiwick of Blakeney in the same manner as if the Act had not been passed. Respecting such a right, Mr. Justice Byles says (*p*) that Messrs. Mathias "claim (as the successors of Mr. Ambrose) a right to grant gales or licenses for working stone quarries in unenclosed lands within a part of the Royal Forest of Dean, called 'Blakeney Walk,' to exact payments in the shape of gale fees or rents in respect thereof, and to apply those payments to their own use without accounting to the crown. They allege that they enjoy this right as woodwards or foresters of the crown in Blakeney Walk; that the office of woodward or forester was annexed to a small manor called 'Blakeney Manor,' which is without the limits of the present Forest of Dean, and that the office, with its perquisites, has devolved upon them as owners of the manor. This is, in effect, an alleged right of an officer of the crown to sell the soil of the crown, and not to account for the proceeds. It is plain, to say the

(*l*) Secs. 52.

(*m*) Secs. 74-78.

(*n*) Secs. 78-81.

(*o*) Secs. 83-84.

(*p*) Atty. Genl. v. Mathias, 27 L.J. Ch. 763.

least, that serious doubts may exist as to the legality of any such right, and that if it can legally exist, it ought to be established by evidence cogent and invincible. But, on the threshold of the case, before arriving at the two inquiries—first, whether in point of law the alleged right can exist; and secondly, whether if so, it ever did in fact exist, the informant presents the preliminary difficulty that the defendants' rights, if ever they had any, are extinguished by the 1 and 2 Vic. c. 43. Into the detailed provisions of that statute it is not necessary to enter, for it is admitted that unless the defendants can bring themselves within the words of the saving clause (section 85) introduced for the benefit of their predecessor in title, one William Ambrose, the statute and the award made under it extinguished all previous right of quarrying, however good in law and however clearly established in fact; thus making a *tabula rasa* on which to inscribe the new rights created by the statute. That saving clause does not purport to save all the rights of William Ambrose, whatever they may have been, but only his right as he stated and claimed it before the commissioners of inquiry." And after stating the nature and object of the claim made by Messrs. Mathias, as successors of the said Mr. Ambrose, as it appears in the 85th section of the statute, the learned judge proceeds to say that "it appears to me, assuming the defendants' claim to be of a nature capable of being supported in point of law, that they have failed to make out any one of those requisites, every one of which they must establish to bring themselves within the saving clause of the statute, and, if that be so, then the extinctive clauses of the statute wipe out and expunge all their rights, whatever they may have been. This alleged right, if it ever existed, must have reposed on one of three foundations—custom, prescription, or lost grant. The right of the free miners is incapable of being established by custom, however ancient, uniform, and clear the exercises of that custom may be. The alleged custom is a custom to enter the soil of another and carry away portions of it. The benefit to be enjoyed is not a mere easement, it is a *profit à prendre*. Now, it is an elementary rule of law that

a *profit à prendre* in another's soil cannot be claimed by custom (*q*), for this, among other reasons, that a man's soil might thus be subject to the most grievous burdens in favour of successive multitudes of persons, like the inhabitants of a parish or other district, who could not release the right. If these observations upon the law of the case be well founded, it is unnecessary to add any further remarks on the evidence; for I regret that I feel it my duty to express to his honour the Vice-Chancellor, my humble opinion that the claim is one which cannot be supported in point of law" (*r*).

Prosper  
Free Level  
Colliery.

Meaning of  
"level."

In another case, an action was brought to try a right to work below a certain level, and which gave rise to a decision being pronounced on the meaning of the "Prosper Free Level Colliery" as used in the schedule to the 1 & 2 Vic. c. 43. Coleridge, J., says (*s*): "The question mainly argued was the meaning of the word 'level.' Now we think it clear that an existing level is here spoken of, which is probably called 'the said level' with reference to the name of the said colliery immediately prefixed, Prosper Free Level Colliery. This level is spoken of as having struck the coal; and as the track extends eastward, this level is made the measure of the southward workings or the workings in the deep, because they are to be carried no farther than will admit of being drained by it. The obvious meaning of this provision is that the level so described is to afford the outlet for all the waters of the colliery merely by gravitation; if its angle might be altered, or if other drains might be made from other points than that at which it struck the coal, to communicate with it at some point lower down in its course, it could no more be said to drain the mine than if water were lifted into it by a steam-engine from any supposable depth, and so carried to the open air; and though it might be possible to calculate the extreme point to which such alterations might be carried, yet the language so understood would certainly not give that present clear boundary which

(*q*) Ante, p. 328, 376.

(*s*) Brain v. Harris, 10 Ex. 908;

(*r*) Atty. Genl. v. Mathias, 27 L.J. s.c. 24 L.J. Ex. 177, Ch. 767.



it must be presumed the commissioners intended to lay down as between this colliery and the adjoining works. In this place the context and the undoubted purpose for which the word is introduced fix its meaning definitely. But even if the meaning we have assigned be not the only or necessary meaning of the language used, it is certainly a meaning which it will bear. No argument was adduced on the part of the plaintiff in error which showed that it could not; and in that case, no contradiction being shown between the schedule and the plan, it is certainly allowable to have reference to the plan. The plan per se, and uncontradicted by the schedule, must be admitted to be of authority; and if we refer to that, all doubt is removed, and the plaintiff is clearly shown to have entered on the colliery of the defendant in error."

Another Act of Parliament was passed on the 26th July, 1861 (*t*), which recited (inter alia) the 1 & 2 Vic. c. 43, the third award of the commissioners, and that no appeal (*u*) had ever been made against the said award, whereby their awards had become absolutely indefeasible. The Act then proceeds to declare the extent of the rights and interests of galees, and to alter and amend the said Act of 1 & 2 Vic. c. 43, and some of the rules and regulations made in pursuance thereof, and also to make other provisions in reference to the mines and quarries within the said forest and hundred of St. Briavels. The 1st section of the Act declares "that the grant of a gale of coal or iron, or of a stone quarry, shall be deemed to have conferred and shall confer on the galee, his heirs and assigns, a license to work the mine, vein, or pit therein comprised, and such grant shall be deemed to have conferred on the grantee, his heirs and assigns, an interest of the nature of real estate (*v*), such license nevertheless being conditional on the payment of all the rents, royalties, and other dues from time to time payable to Her Majesty, her heirs and successors, in respect thereof, and the observance and performance of the several enactments, provisions, rules, and regulations for the time

24 & 25  
Vic. c. 40.

Galee's in-  
terest real  
estate.

(*t*) 24 & 25 Vic. c. 40.

(*v*) *Doe d. Thomson v. Pearce*, 2

(*u*) See sec. 19 of 1 & 2 Vic. c. 43. *Peake*, 242.

being in force for the proper opening, working, use, and management of the gale.

Conditions  
on which  
certain  
leases are  
granted.

“Every lease of stone, clay, or sand granted or to be granted shall in like manner be deemed to have been granted and to be granted conditionally on the payment of all the rents, royalties, and other dues from time to time payable to Her Majesty, her heirs and successors, in respect thereof, and the observance and performance of the several enactments, provisions, rules, and regulations for the time being in force for the proper opening, working, use, and management thereof, and of the covenants in the lease contained (if any); provided always, that nothing in this Act contained shall enlarge or diminish or in any way affect any right of re-entry or eviction or liability to forfeiture; but every gale, pit, level, work, and quarry shall be subject in all respects to the same liability to forfeiture and eviction, and no other, as if this Act had not been passed” (*w*).

Possession  
imposes  
personal  
responsibility.

Without granting any relief to any person bound by covenant, condition, or other stipulation, the said Act attaches a personal responsibility to the person in actual possession or receipt of the gale or of the proceeds thereof, to pay all rents, royalties, or other dues from time to time to become payable in respect of every gale of coal, iron, or stone, and to the observance of the prescribed rules and regulations of the forest and hundred (*x*).

Gavellers  
powers en-  
larged.

The gaveller is empowered to sue for and recover in the county court any rent, royalty, and other payment, which separately or together shall not amount to £50 (*y*); and the provision made by the 46th section of 1 & 2 Vic. c. 43, respecting the payment of the galeage, rent, royalty, or tonnage duty, is amended, and the days therein fixed for the cesser or determination of the said duties is altered and other provision made in reference thereto (*z*). The previous powers to refer disputes respecting the said rents, royalties, and tonnage to arbitration are extended (*a*). The

(*w*) Secs. 2, 3.

(*x*) Sec. 4.

(*y*) Sec. 5.

(*z*) Sec. 7.

(*a*) Sec. 8.

gaveller has enlarged powers and duties given and imposed on him respecting the registry of the transfer of gales and leases where the rent is in arrear or the transfer imperfect, and all transfers requiring registration, which are not registered, are declared to be void (*b*), without prejudice, however, to the power of making entries *nunc pro tunc* provided for by the 59th section of 1 & 2 Vic. c. 43.

The power given to Her Majesty's Commissioners of Woods and Forests by the 25th section of 1 & 2 Vic. c. 43, to grant leases for mining purposes, is now extended to any lease for the more convenient working of any Mine, Work, or Quarry, or manufacture of the produce thereof, as well as to land to be attached to every house erected or to be erected on any land to be leased by them (*c*). And the 65th section of 1 & 2 Vic. c. 43, which enabled the said commissioners to grant licenses for sinking air-shafts, is also to be extended so as to enable the said commissioners to grant licenses to sink or open, and work and use any pits, shafts, or levels for any purpose, and to make any roads other than railroads or tramroads therein, and to grant licenses to use Right of Way, or Water, or of Outstroke or Instroke and other easements, and any such right, privilege, and easement as in the 65th section of the said Act, or in this section mentioned, may be granted in, upon, through, or under any of the waste lands, as well as the enclosed lands belonging to the crown within the said forest, or under any mine, quarry, land, or work comprised in any existing gale, lease, or grant, subject to the terms and conditions therein provided (*d*). And the 84th section of 1 & 2 Vic. c. 43, which enabled the said Commissioners of Woods and Forests to grant leases to dig and get clay or sand off and from any of the open or waste lands of the forest, is to be extended to the granting of leases of any clay or sand which might be found in any pit, level, quarry, or work, to the person entitled to the gale, pit, level, quarry, or work, and also to the granting of such leases as in the said section are mentioned of any part or parts of

Powers of Commissioners of Woods and Forests to grant leases and licenses enlarged.

(*b*) Secs. 9-14.

(*c*) Sec. 6.

(*d*) Sec. 15.



the open or waste lands of the said forest, for the purpose of erecting kilns and other works and buildings for the manufacture and burning of any clay, already leased or to be leased under the said section, or this present section, into bricks or tiles, upon the terms and conditions therein mentioned (*e*).

Compensation re-  
specting  
surface  
damage.  
Gales.

The powers of the gaveller under the 68th section of 1 & 2 Vic. c. 43, as to awarding compensation for surface damage, is varied (*f*).

All gales of coal or iron, and all gales or leases of quarries, may be given up by notice, with or without a deed (*g*) or other surrender, and two or more gales may be united, or divided, and re-granted (*h*). The gaveller may settle any dispute as to boundaries, and alter with consent the boundaries of adjoining gales (*i*), and license the working and disposing of the coal in any barrier (*j*). All deeds and grants of gales, or other instruments, including leases, licenses, surrenders, contracts, agreements, receipts, appointment, certificates, awards, entered into or given for the purposes of effecting sales, purchases, or exchanges under the 10 Geo. IV. c. 50, or subsequent Acts, are declared to be free from stamp duty (*k*).

Labourers'  
cottages.

Further provision is made respecting the woodman's or labourers' cottages in the forest (*l*); and any one Commissioner of the Woods and Forests may act on behalf of the others (*m*).

Unlawful  
trespass.

The provisions of 10 Geo. IV. c. 50, and of 1 & 2 Vic. c. 42, as to unlawful trespasses, extend to all cases of trespasses, by cutting, taking, or carrying away of turf, gravel, stone, sand, or other soil within the said forest (*n*).

The Acts of 1 & 2 Vic. c. 43, and 24 & 25 Vic. c. 40, are to be construed together as one Act (*o*).

(*e*) Sec. 17.

(*f*) Sec. 16; *Allaway v. Wagstaff*,  
4 Hurl. & N. 307, 681.

(*g*) Secs. 19, 20.

(*h*) Sec. 21.

(*i*) Sec. 23.

(*j*) Sec. 24.

(*k*) Sec. 22.

(*l*) Sec. 26.

(*m*) Sec. 27.

(*n*) Sec. 25.

(*o*) Sec. 28.

## DERBYSHIRE.

*Antiquity of the customs—confined to Lead Mines and certain Manors.*

**THE HIGH PEAK**—14 & 15 Vic. c. 94—*Interpretation of the words "mine, vein, ore, mineral property"—mining customs, and jurisdiction of the Barmote Courts defined—power to make new Laws—the extent of that power—new Laws, 1859—Synopsis of Act and new Laws—Schedule of new Laws—interpretation thereof.*

**WAPENTAKE OF WIRKSWORTH AND PRIVATE MANORS**—15 & 16 Vic. c. clxiii.—*Jurisdiction and customs defined and amended—Synopsis of the Act—Schedule of Articles and Customs.*

*Peculiarity of Customs in the Lead districts—profit à prendre in alieno solo—no compensation to the owner of the soil—Tithes payable. Coal and Iron not subject to the Customs.*

The mining laws and customs of Derbyshire are of undoubted antiquity, but they do not extend to the whole of the county, or to all mines and minerals there, but are confined to lead mines situate within certain defined liberties and manors; in some of which Her Majesty is entitled to the minerals dues in right of her Duchy of Lancaster (a), and in others, the lord of the manor. The customs of the miners were inquired into by Edward I., in pursuance of a commission issued in the tenth year of that monarch's reign. The commission was duly executed by a jury, who by their inquisition found that the miners had enjoyed ancient privileges not by virtue of a charter, but by immemorial custom. The king, thereupon, acknowledged their privileges, and they have ever since enjoyed them, subject to regulations prescribed by the Mineral Barmote Courts, particularly in the 17th and 18th centuries (b). The customs of some of the private manors and liberties were also regulated in a similar manner; whilst, in one or two instances, the customs are entirely oral and traditional. Like many other ancient mining laws and customs, those of Derbyshire became by degrees confused and uncertain, and in other respects they were wholly inadequate to meet the require-

Antiquity  
of custom.

(a) Plowden, 212; Atty. Genl. v. Wall, 4 Bro. P.C. 665; note (a) in 1 M. & G. 589; Arkwright v. Gill, 5 M. & W. 204.

(b) Atty. Genl. v. Wall, 4 Brown's P.C. 673; see ancient customs cited in Houghton's Compleat Miner, London, 1681.

ments of the miners, or the modern scientific mode of carrying on mining operations, and accordingly two Acts of Parliament were passed, under and by virtue of which, the rights of the crown, the lord of the field, and the miner, are respectively defined, and the jurisdiction of the ancient mining courts extended and amended. Both of these Acts follow closely the ancient laws and customs.

# HIGH PEAK.

The 14 & 15 Vic. c. 94, relates to the customs of that part of the hundred of High Peak, called the Kingsfield, in which Her Majesty is entitled to the minerals duties, and which comprises the following liberties, viz., Castleton, Bradwell, Hucklow (*c*), Winster, Monyash, Taddington, and Upper Haddon; and also to the jurisdiction and practice of the Barmote Courts in those districts. By this Act, the word "founder" is to mean the point at which the vein shall be first found, and "founder meers," the first meers to be set out to the finder under the

Interpreta-  
tion of  
"mine,"  
"vein,"  
"ore,"  
"mineral  
property."

provisions of the Act. The words "mine or mines, vein or veins," are to signify a mine or mines, vein or veins, of lead ore, and include parts of or shares in any mine or vein as well as entire mines and veins, and all minerals containing lead ore; the word "ore," is to signify lead ore and belland exclusively, and the words "mineral property" to include mines and veins of lead, and parts of, or shares in, any such mines or veins, and the works, rights, and appurtenances connected therewith, and also lead ore, and all tools, materials, goods, chattels, and effects used in searching for, getting, cleansing, or preparing lead ore, whether such tools, materials, goods, chattels, or effects be or be found in or upon any mine or works or elsewhere (*d*).

Jurisdic-  
tion of  
courts and  
customs.

By section 16 of the Act, it is provided that the jurisdiction of the said great and small Barmote Courts is to extend over the whole of the before-mentioned district called Kingsfield, and also over all the parts of the hundred of High Peak aforesaid, in which Her Majesty, in right of her Duchy of Lancaster, is entitled to the mine-

(*c*) A claim to the minerals free made by a proprietor of some land in from the Customs, has lately been this liberty.

(*d*) 14 & 15 Vic. c. 94 s. 2.



ral duties; and the mineral laws and customs for those districts are to be such only as are mentioned and comprised in the Act, and no other alleged custom or practice whatsoever. But by a subsequent section in the Act, it is provided, that "it shall be lawful for the steward and grand jury, at any great Barmote Court, to make such new and additional customs, articles, rules, and orders, as to them shall seem expedient for the better regulation of the working and carrying on of the mines within the district under the provisions of this Act, and for the guidance and protection of the mines in reference to the working and carrying on of mines within the said district, and also for regulating the practice and proceedings of the great and small Barmote Courts, or of any views or other proceedings, and for the execution of any process of such courts, and in relation to any of the provisions of this Act, or of the articles and customs hereby established; and all such new and additional customs, articles, rules, and orders as aforesaid, shall be certified under the hand of the steward and seal of the said court to the chancellor for the time being of Her Majesty's Duchy of Lancaster, the same having been previously submitted to the lessee, if any, for the time being of the duties of lot and cope, and approved of in writing by him; and the same shall be published for three weeks consecutively in some newspaper printed in the county of Derby; and such chancellor may, after such publication, either allow or disallow such new and additional customs, articles, rules, and orders, or any of them; and such of the new and additional customs, articles, rules, and orders as shall be so allowed by such chancellor, shall forthwith, after the approval thereof, be sealed with the seal of the said Duchy of Lancaster, and laid before both Houses of Parliament (if Parliament be then sitting, or, if Parliament be not sitting, then within five days of the next meeting thereof), and no such new or additional custom, article, rule, or order, shall have effect until six weeks after the same shall have been so laid before both Houses of Parliament; and any new or additional custom, article, rule, or order so allowed and laid before Parliament as aforesaid

Power to  
make new  
laws at  
any great  
Barmote  
Court.

shall, from and after the expiration of such period of six weeks, be of the same force and effect as if the same had been enacted by authority of Parliament, unless the same shall by vote or resolution of either house of Parliament be objected to; and such new and additional customs, articles, rules, and orders shall be carefully preserved by the steward: Provided always, that such new and additional customs, articles, rules, and orders shall not in any way affect the rights and interests of owners or occupiers of land."

Meaning of  
sections 16  
& 56 when  
read to-  
gether.

The before-mentioned 16th section would seem to have precluded the possibility of any new laws being established; but that section is irreconcilable with the 56th, if it was intended by the latter section to confer upon the steward and grand jury, power, at any great Barmote Court, to make or ordain new laws. The reasonable interpretation of the two sections combined would seem to be, that any rules and "customs" which would be prescribed in pursuance of the 56th section should be confined to regulations respecting the working of the mines; but however this may be, "new and additional customs, articles, rules, and orders," as they are termed, of a much more extensive nature, were made by the steward and grand jury of a great Barmote Court, held at Monyash, on the 5th April, 1859. The new "customs" were approved of by the Duke of Devonshire as lessee of the duties of lot and cope, and by the Chancellor of the Duchy of Lancaster; and they were laid before Parliament, and finally ratified and confirmed, as required by the Act; nevertheless, the validity of some of the new customs is by no means established, and will, probably, give rise to litigation. It is, indeed, much to be regretted, that any power was given by the Act to make new laws, especially by the grand jury of the great Barmote Court, as that body is entirely composed of working miners, whose interests, if not opposed, are at all events of a different character to the interests of the owners of the soil who have no voice in the making of new laws. As might have been expected, the new laws materially qualify the laws prescribed by the Act, in a manner, too, by no means favourable to the proprietor of the land; and in

New laws,  
1859.

other respects the new laws have not been favourably received.

The following is a synopsis of the provisions of the Act, and the new laws of 5th April, 1859 :

*Barmaster (e)* and Deputy-Barmaster.

Sections of Act, 1, 9, 10, 11, 12, 13, 14, 21, 42, 47,  
49, 52.

Jurisdiction  
and  
practice of  
the courts.

New Laws, Art. 58.

*Courts (Great Barmote) (f).*

Sections of Act, 6, 7, 8, 15, 16, 38, 48, 52, 54, 57.

New Laws, Arts. 22, 23.

*Courts (Small Barmote).*

Sections of Act, 6, 7, 8, 15, 16, 17, 24, 25, 26, 27,  
28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39.

New Laws, Arts. 24, 25, 26, 27, 28, 29, 30, 31, 32,  
33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45,  
46, 47, 48, 49, 50, 51, 52, 53, 54.

*Courts (Practice in).*

Sections of Act, 17, 19, 20, 21, 25, 26, 27, 28, 29,  
30, 40, 41, 48, 51, 52, 53, 54.

*Costs.*

Section of Act, 53.

New Laws, Arts. 52, 53.

*Interpleader.*

Section 46.

New Laws, Arts. 54, 55.

*Jurors (g).*

Sections 22, 23, 24, 38, 39.

New Laws, Arts. 13, 14, 15, 16, 17, 18, 19, 20, 21.

*Limitation of Action.*

Section 51.

*Penalties.*

Sections 47, 50.

*Steward.*

Sections 3, 4, 5, 21, 24, 31, 32, 33, 38, 43, 44,  
45, 49.

New Laws, Art. 26, 42, 46, 47, 48, 50, 51, 57, 58.

(e) Arkwright v. Cantrell, 7 Ad. & Ell. 565; Sybray v. White, 1 M. & W. 435.

(f) Sybray v. White, *suprà*.

(g) Sybray v. White, *suprà*.



Crown.

By the 57th section of the Act it is provided that nothing therein contained shall prejudice or diminish the rights or privileges of the Queen, her heirs and successors, either in right of her crown or her Duchy of Lancaster.

NEW LAWS  
made 5th  
April, 1859

The schedule of articles and customs appended to the Act are very similar to those hereafter set out (*h*); we have not, therefore, thought it necessary to insert them in this place. The following are the new and additional laws made on 5th April, 1859 :

Meaning of  
"buddling."

"1. The word 'buddling' shall be substituted for the word 'bridling' in the 5th article of the High Peak Mining Customs and Mineral Courts Act, 1851, and the said 5th article is to be read and construed as if the word 'buddling' and not the word 'bridling' had been originally inserted therein.

Form of  
transfer of  
a mine.

"2. On any person transferring any mine or vein, or any share or interest therein to any other person, the transferor and transferee shall both execute a transfer in the words or to the effect following, namely :

#### FORM OF TRANSFER.

"I [A. B.] of \_\_\_\_\_ in the County of [Derby, lead miner] in consideration of the sum of \_\_\_\_\_ paid to me by C. D., of \_\_\_\_\_ in the County of [Derby, lead miner] do hereby grant, transfer, and convey unto the said C. D. all that mine [or, all those my three twenty-fourth shares of and in a mine] called the \_\_\_\_\_ situate in the liberty of \_\_\_\_\_ in the district of Kingsfield, in the hundred of High Peak, in the county of Derby, and the rights, works, and appurtenances connected with the said mine ; and also the lead ore and all tools, materials, goods, chattels, and effects used in searching for, getting, cleansing or preparing lead ore in or about the said mine ; To HOLD the said mine [or the said shares of and in the said mine] unto the said C. D., his heirs and assigns ; and [of and in] the said chattels, unto the said C. D., his executors, administrators, and assigns, subject to the provisions of the High Peak Mining Customs and Mineral

Courts Act, 1851; AND I the said C. D. do hereby accept and undertake to hold the said mine [or the said shares of the said mine] chattels and premises subject to the same provisions. As WITNESS our hands and seals the day of \_\_\_\_\_ in the year One thousand eight hundred and \_\_\_\_\_

“Signed sealed and delivered by the above-named A. B. and C. D. in the presence of \_\_\_\_\_

“And in such transfer the true consideration for the making thereof shall be stated in words at length; and on transfer being presented to the barmaster or deputy barmaster, duly stamped and executed, and proof being given to his satisfaction of the due execution thereof, the barmaster or deputy-barmaster shall enter such transfer in the book to be kept by him, as mentioned in the 14th section of the High Peak Mining Customs and Mineral Courts Act, 1851; and every such transfer, when so entered, shall be valid and effectual, and the entry thereof in the barmaster’s book shall be *primâ facie* evidence of the due making and execution of such transfer.

“3. When any person entitled to any mine or vein, or any share or interest therein, shall become bankrupt, or <sup>Bank-</sup>ruptcy. take the benefit of any Act for the relief of insolvent debtors, a certificate of the appointment of an assignee or assignees of his estate, when presented to the barmaster, shall be entered by him in his said book.

“4. When any person entitled to any mine or vein, or <sup>Death.</sup> any share or interest therein shall die, having devised or bequeathed the same, the probate of his will and all codicils thereto (if any), or letters of administration, with his will and all codicils thereto (if any) annexed, when presented to the barmaster, shall be entered by him in his said book, so far as the same relates to the devise or bequest of any such mine or vein, or any estate or interest therein.

“5. A miner who has raised ore shall not proceed to <sup>Measuring</sup> have his ore measured in the absence of the barmaster, under the 7th article of the High Peak Mining Customs and Mineral Courts Act, 1851, unless the barmaster shall neg-<sup>ore.</sup>

lect or refuse to attend to measure the ore, at a time and place of which the miner shall have given the barmaster three previous days' notice in writing.

Finder of  
new vein.

"6. The finder of any new vein shall be entitled to purchase, at such price as the barmaster and any two or more of the grand jury may fix and determine, the meer set out for and belonging to the lessee for the time being of the duties of lot and cope, or to Her Majesty or her successors (as the case may be), under the 10th article of the High Peak Mining Customs and Mineral Courts Act, 1851, if such lessee or Her Majesty, or her successors (as the case may be), shall neglect or refuse, duly and reasonably to work such meer.

As to no-  
tice of  
unworked  
mines.

"7. In all cases where the barmaster finds a mine or vein neglected and not wrought, from whatever cause, he may, on the application of any person or persons, deliver or send to the owner or reputed owner of such neglected mine or vein, the notice required by the 19th article of the High Peak Mining Customs and Mineral Courts Act, 1851, to be sent to such owner, or reputed owner; and such notice may be delivered personally, or may be sent by the barmaster by post, directed to such owner or reputed owner. Where any of the owners or reputed owners of a mine or vein neglected, and not wrought, are not known to the barmaster, it shall be sufficient if the barmaster shall put up the notice required by the said 19th article, on or near the mine, and also in some other conspicuous place within the liberty in which the mine or vein is situate, and shall deliver or send to any one of such owners or reputed owners as may be known to him (if any be known to him, but not otherwise), a copy of such notice; and after the notice required by the said 19th article shall have been given as aforesaid, it shall be sufficient if the barmaster and two or more of the grand jury shall inspect the said mine or vein at the expiration of the three weeks mentioned in such notice, and shall sign a certificate that the neglected mine or vein has not been reasonably worked to their satisfaction, and that no sufficient reason has been assigned to them for



not working the same, and, thereupon, the barmaster, in the presence of two or more of the grand jury, may give such mine or vein to any person or persons willing to work the same.

“8. Instead of the space of six days limited by the 20th article of the High Peak Mining Customs and Mineral Courts Act, 1851, a person having shares in a mine shall not forfeit his part or share to his partners unless he refuses to join his partners or the owners of the other shares in working the same, or to pay his proportion of the expenses of working the same for the space of twenty-one days after the same has been demanded by the party complaining, or his agent. Partners refusing to work mine.

“9. Where the owners or partners of or in any mine or vein exceed three in number, they may, from time to time appoint and register with the barmaster, an agent being a partner or not, in whose name, when registered, actions may be brought and defended in the small Barmote Court, for and on behalf of the owners of the mine or vein, and upon a judgment or order against such agent execution may be levied on the mineral property of the owners of the mine or vein on whose behalf the agent may sue or be sued. Partners.

“10. The actions of title which are authorized to be brought and maintained by the 20th article of the High Peak Mining Customs and Mineral Courts Act, 1851, as varied by the 8th new article hereinbefore contained, may be brought and maintained in the name of such registered agent as aforesaid, for and on behalf of the persons who, under the two last-mentioned articles are entitled to bring and maintain actions of title in the small Barmote Court in the cases therein mentioned, and the persons on whose behalf such actions shall be brought shall be liable and entitled in the same manner as if such actions had been brought and maintained in their own names. Actions.

“11. The plaintiff or defendant in any action shall not be entitled to require a view unless he should have given notice thereof in writing to the barmaster ten clear days

at the least before the day appointed for the trial, instead of six clear days as required by the 22nd article of the High Peak Mining Customs and Mineral Court Acts, 1851.

Consolidating titles.

"12. The title to veins shall not be consolidated under the 27th article of the High Peak Mining Customs and Mineral Courts Act, 1851, excepting with the consent in writing of the barmaster and grand jury."

Interpretation of new laws.

By the 59th article, the second section of the Act (*i*) is to apply to the construction of the foregoing new laws, unless there be something in the context of the Act, or the articles, customs, rules, or orders repugnant to such construction.

WAPENTAKE OF WIRKSWORTH AND PRIVATE MANORS.

The mineral customs, and the jurisdiction and practice of the Barmote Courts within the soke and wapentake of Wirksworth, and within the private manors of Ashford, Stoney Middleton and Eyam, Hartington, Litton, Peak Forest, Tideswell, and Youghreave, in the High Peak, and of Crich, in the Low Peak, are defined and amended by the 15 & 16 Vic. c. clxiii. (*j*). Hassop and other manors are not included in the above Act or the before-mentioned Act relating to the High Peak, consequently those manors must still be governed by the ancient customs.

Hassop excluded.

Jurisdiction of courts, and customs.

By section 25 the jurisdiction of the great and small Barmote Courts for the soke and wapentake of Wirksworth is to extend over the whole of the Kingsfield within the said soke and wapentake, and the jurisdiction of the great and small Barmote Courts of the said several manors or liberties respectively is to extend over such manors or liberties respectively; and the mineral laws and customs of the said soke and wapentake, and manors or liberties, are to be such as are mentioned and comprised in the Act, and no other alleged custom or practice is to be valid after the passing of the Act: Provided, nevertheless, that nothing in this Act contained is to extend the mineral laws, usages, and customs by the Act defined and amended, over any lands or hereditaments within any of

(*i*) Ante, p. 412.

(*j*) Vide preamble of the Act, and

secs. 26 & 44, as to how far Eyam is affected by the Act,

the manors or liberties hereinbefore mentioned, which are not now subject to mining customs, nor be held to subject or make liable any lands or hereditaments to the said customs which are now exempt therefrom, nor to give authority to search for mines and veins of lead ore, in or upon any lands or hereditaments over which the mineral customs of the said Kingsfield, or of the said manors or liberties, or any of them, which have not before been subject to the customs (*k*). The interpretation of the words "mine," "vein," "ore," "mineral property," is the same verbatim as that contained in the High Peak Act, 1851 (*l*); but there is no clause in the present Act similar to that which was introduced in the High Peak Act, for making new laws and customs.

The rights and privileges of the crown are not to be Crown.  
prejudiced, diminished, altered, or taken away by the statute (*m*); nor the right of the proprietors of spar and lime-  
stone under certain lands in the manor of Crich (*n*). Manor of Crich.

The following is a synopsis of the other matters provided for by the 15 & 16 Vic. c. clxiii.:

*Barmaster and Deputy Barmaster.*

Sections of Act, 6, 18, 19, 20, 21, 22, 23, 30, 42,  
50, 53.

Jurisdiction and  
practice of  
the courts.

*Courts (certiorari).*

Sections of Act, 38, 39, 60.

*Courts (jurors in).*

Sections of Act, 31, 32.

*Courts (Small Barmote).*

Sections of Act, 11, 12, 16, 17, 24, 25, 63.

*Courts (Great Barmote).*

Sections of Act, 11, 12, 13, 14, 15, 16, 17, 24, 25  
63.

*Courts (practice in).*

Sections of Act, 27, 28, 29, 33, 34, 35, 36, 37, 40,  
41, 48, 49, 57, 61, 62.

*Interpleader.*

Section of Act, 54.

(*k*) Sec. 65.

(*l*) Ante, p. 412.

(*m*) Sec. 68.

(*n*) Sec. 66.



*Jurors.*

Sections of Act, 10, 43, 44, 45, 46, 47.

*Limitation of action.*

Section of Act, 59.

*Penalties.*

Sections of Act, 55, 56.

*Steward of Wirksworth Barmote Court and of Private Liberties.*

Sections of Act, 3, 4, 5, 6, 7, 8, 9, 10, 30, 41, 42, 51, 52, 53, 58.

*Witnesses.*

Section of Act, 10.

## CUSTOMS.

The following is a schedule of articles and customs comprised in and confirmed by the statute :

All subjects of the realm may dig for lead.

“1. It is lawful for all the subjects of this realm to search for, sink, and dig mines or veins of lead ore upon, in, or under any manner of lands, of whose inheritance soever they may be (churches, churchyards, places for public worship, burial-grounds, dwelling-houses, orchards, gardens, pleasure-grounds, and highways excepted) (o); but if no vein of ore be found, or if the founder meers be not freed as provided by the eleventh article, and the person making search abandon it for fourteen days, the land must be levelled and made good by the person making the search within the space of twelve clear days, after the expiration of the said fourteen days, or the owner of such land may level and make good the same, and recover the expenses thereof from the miner in an action of debt in the small Barmote Court or in the County Court: Provided always, that nothing herein contained shall prevent or hinder the miner from following and working his vein, and searching for and getting lead ore under such excepted places as aforesaid at a lower depth than fifteen yards from the surface; but in case by so doing he shall damage or injure any such excepted places, or the surface

Excepted places.

(o) *Gilbert v. Tomison*, 4 D. & R. 1317; *Lynn Regis v. Taylor*. 3 Lev, 222; *Beresford v. Bacon*, 2 Lutw. 160.

thereof, the owner or reputed owner and occupier may recover from such miner compensation for such damage or injury, by action in the County Court if the damage shall not exceed fifty pounds, or otherwise by action in the superior courts; but in case the owner or reputed owner or occupier of such excepted place as aforesaid apprehends that such working is carried on at a less depth than fifteen yards from the surface, or will endanger the security of such excepted places, the steward and grand jury shall have power to suspend the working of such vein, or to direct the working thereof, so as to prevent such damage.

“2. In all cases the landowner shall have power to sell and dispose of the calk, feagh, spar, and other minerals, and rubbish (except lead ore), and to remove the same from his land so soon as the lead ore has been extracted from it, when and as often as he thinks proper, and when not required for the use of the mine, but not so as to destroy or injure any mineral property, without the consent of the barmaster and any two members of the grand jury: Provided always, that the landowners shall have the power of removing such calk, feagh, spar, and other minerals and rubbish at the expiration of eighteen months after the same shall have been raised, notwithstanding all the lead ore may not have been extracted therefrom; provided also, that the calk, feagh, spar, and other minerals and rubbish now raised, and from which the lead ore has not been extracted, shall not be removed until after the expiration of eighteen months from the passing of this Act.

Landowner  
may sell  
minerals  
except  
lead.

“3. The barmaster and every deputy barmaster shall provide a dish or measure for measuring the ore, to be adjusted as hereinafter mentioned, and they shall forfeit a sum not exceeding two pounds every time they are required to measure ore at any mine and are unprovided with such dish or measure, such penalty to be recovered and received for his own use by the person who shall have required the ore to be measured, by an action in the County Court. The dishes or measures for the wapentake of Wirksworth and manor of Crich respectively are to be

Dish to be  
provided  
for mea-  
surement  
of ore.

adjusted in the presence of two of the grand jury, according to the standard brazen dish deposited in the moot hall at Wirksworth, and if such standard brazen dish be at any time hereafter lost or destroyed, or become unfit for use, then the dishes or measures for the said wapentake and manor respectively shall be adjusted in like manner as the dishes or measures for the other manors or liberties mentioned in this Act; the dishes or measures for the said other manors or liberties shall be adjusted in the presence of two of the grand jury, and shall contain fifteen pints of water.

Ways to  
mine to be  
set out.

“4. The barmaster, together with two of the grand jury, shall provide the miners a way, either for foot passengers or carts as may be required, from the highway lying most convenient to the mine, and also from the mine to the nearest running stream of water, not being ornamental water or a private fishery, such ways to be set out in as short a course as may be practicable and reasonable, but not to enter any such excepted places aforesaid. No compensation is to be claimed by the occupier or landowner for such ways, but such ways are not to be considered public, and the use thereof is to be limited to persons and purposes connected with the mine. The parties entitled to use the way may make sufficient ways for use, and shall keep the same in repair; and if any such way shall pass over any enclosed lands, the owner or owners of the said mine shall, previously to using the same, set up and make good and proper gates or stiles, as the case may require, and keep such gates or stiles, with all proper fastenings, in a good state of repair, to the satisfaction of the barmaster: and may also use for mining purposes the water from the nearest running stream, but so as not to defile the waters of such running stream, or to lessen the same so as to deprive cattle of a sufficiency of water therefrom. If the owner or occupier of any land is dissatisfied with the mode in which any way is set out by the barmaster, or with the mode in which any such way is used by the miner, such owner or occupier may apply to the steward, and the steward shall thereupon inquire into the matter, and shall in a summary way make such orders respecting the setting



out or user of the said way as to him shall seem just, and such way shall thereafter be set out and used in such manner only as the said steward shall direct.

“5. Every miner shall, so long as his mine shall be worked, be entitled, without making any payment for the same, to the exclusive use of so much surface land as shall be thought necessary by the barmaster and two of the grand jury, and be set out by them from time to time for the purpose of laying rubbish, dressing his ore, buddling, making meers or ponds, and conveying water thereto, and any other mining purposes. The miner shall in all cases before he commences any search or uses any land make fences sufficient for the protection of cattle from any injury which might arise from his operations, and keep the fences so from time to time to be set up in sufficient repair, if required by the landowner or occupier so to do: Provided always that nothing herein contained shall entitle any person to use any lands for the purpose of buddling old hillocks which at the time of such buddling shall be grassed over or otherwise cultivated (notwithstanding a mine may be in workmanship), without rendering and paying to the owner of such lands one thirtieth part in value of all such lead ore as shall be found and gotten in and from such old hillocks, as and when such lead ore shall have been made merchantable and fit for smelting, and shall have been measured by the barmaster, and (if required by such landowner) before the same lead ore shall be removed and taken away.

Miner entitled to use surface.

Fences.

Not to bud-  
dle old hil-  
locks.

“6. Any person may transfer his interest in any mine or vein to any other person by causing an entry of such transfer to be made by the barmaster in the book to be kept by him as herein-before mentioned in this Act, and such transfer, when so entered, and not till then, shall be valid and effectual; and any person may require the barmaster to enter any grant, conveyance, probate of will, or other assurance hereafter to be made relating to any mine, in the book to be kept by him, which entry shall contain the date, names, and descriptions of parties, and consideration of the grant or other assurance, and if a will, the

Interest in  
mine trans-  
ferable.

dates and name of the testator, and devisee, and date of probate, and name of court where proved, and the name and description of the mine or mineral property described or referred to in such document; and the barmaster shall be required to make such entry accordingly on having the original document produced to him for that purpose, and shall endorse on such document a certificate of the date of such entry, and the page of his book in which it is made, and sign the said certificate, which certificate so endorsed shall be taken and allowed as evidence of such entry in all courts of law and equity whatsoever; and every document so entered shall in all questions of title have priority over all other documents hereafter made or executed which are not entered in the barmaster's book, and such documents as are so entered shall have precedence over each other according to their respective dates of entry (*p*)

Measuring  
of ore.

“7. When ore has been raised by any miner, and he shall desire such ore to be measured, the miner shall give the barmaster three days' notice of the time he intends to measure; and if the barmaster neglect or refuse to attend, then the miner may employ any two persons, one of them being on the grand jury, who shall measure such ore, and lay the duties aside for the use of the persons entitled thereto.

Ore not to  
be removed  
until mea-  
sured.

“8. No person shall remove any ore from the mine unless and until the same shall have been measured by the barmaster, or by such two persons as aforesaid in the event of the non-attendance of the barmaster, upon pain of forfeiting the full value thereof to the person for the time being entitled to the duties of lot and cope; and in case of non-payment of such value, after six clear days' notice requiring the same shall have been given by the barmaster to the miner, or affixed in or upon some part of the mine or the works thereof, the mine at which such ore was got shall be forfeited to the person for the time being entitled to the said duties; and possession thereof may be recovered by action of title in manner hereinafter provided.

“9. The duties heretofore called the duties of lot and cope are and shall be payable in the said soke and wapentake to the Queen and her successors, or to her or their lessee for the time being, and in the said several manors or liberties, to the several persons in this Act mentioned to be respectively entitled to the mineral duties, and to their respective heirs or assigns, or the parties entitled in remainder or reversion, or after or subject to the estates or interests of such persons. The duty called lot is and shall be such as is hereinafter mentioned; that is to say, in the said soke and wapentake one thirteenth part of all ore raised; in the manor or liberty of Crich, one ninth part of all ore raised; in the manors or liberties of Ashford, Hartington, Peak Forest, Tideswell, Stoney Middleton and Eyam, Youldgreave and Litton, one thirteenth part of all the ore raised (g). The duty called lot is to be set apart and taken by the barmaster when he measures any ore. The duty called cope is and shall be such as is hereinafter mentioned; that is to say, in the said soke and wapentake the duty called cope is and shall be the sum of sixpence for every load of ore measured; in the manors or liberties of Crich and Ashford, the duty called cope is and shall be the sum of sixpence for every load of ore measured; in the manors or liberties of Hartington, Peak Forest, and Tideswell, Stoney Middleton and Eyam, Youldgreave and Litton, the duty called cope is and shall be fourpence for every load of ore measured. Every such load as aforesaid is to contain nine dishes, whereof each dish in the said soke and wapentake, and in the said manors or liberties respectively, is to be of the capacity provided by the third article with respect to the said soke and wapentake, and the said manors or liberties. The said duties of lot and cope are and shall be payable in addition to the payments mentioned in any other article comprised in this schedule. And if any person shall neglect or refuse to pay the said duty or cope, the same may be recovered in the said soke and wapentake by the barmaster, on behalf of the Queen and her suc-

Lot and  
cope.

Lot and  
cope re-  
coverable  
at law.

(g) Atty. Genl. v. Wall, 4 Brown's P.C. 678, 4 Feby. 1760.



cessors, or of her or their lessee for the time being, and in the said several manors or liberties by the several persons for the time being entitled thereto, by action of debt in the Small Barmote Court, or by action in the County Court.

Founder's  
meers.

“10. If any new vein be found by any miner or any other person whatsoever, the first finder shall be entitled to two meers in length of the said vein, one meer on each side of the founder to be measured and set out by the barmaster, in the presence of two of the grand jury, on the surface of the ground, within six days after notice given to him by the finder, and the third meer shall in the said soke and wapentake belong to the lessee for the time being of the duties of lot and cope; and if there shall be no such lessee, then to the Queen and her successors; and in the said several manors or liberties such third meer shall belong to the person for the time being entitled to the mineral duties; such third meer shall be measured and set out in manner aforesaid, one half at each extremity of the said two meers, and the finder shall be entitled to each subsequent meer, not exceeding fifty meers in such vein, to the extent he shall claim or require at the time of setting out the first two meers, and such subsequent meers shall be set out either wholly in one direction in the said vein, or partly in one direction and partly in the other direction in such vein, as the miner shall choose at the time of setting out the said last-mentioned meers, and the barmaster shall enter the particulars of the gift in his book; and if the lessee for the time being of the duties of lot and cope, and if there shall be no such lessee, then, if the Queen or her successors, or if any of the other persons entitled to such third meer, neglect or refuse duly and reasonably to work such third meer, the finder shall have the right to purchase the said meer at such price as the barmaster and any two or more of the grand jury may fix and determine, or the finder may continue and maintain his workings through the said meer, upon laying aside all the ore that may be gotten therein, after deducting the expenses of getting the same.

Meers to be  
worked.

“11. The barmaster shall not set out any ground under

the tenth article until ore shall have been raised from the mine for which such ground shall be required, nor until there shall have been paid to the barmaster in the said soke and wapentake, and to the person for the time being entitled to the mineral duties in the said manors or liberties respectively, a dish of ore to be called the freeing dish, such dish in the said soke and wapentake, and in the said manors or liberties respectively, to be of the capacity provided by the third article: and the miner shall in like manner deliver a similar dish of ore for every subsequent meer which he shall reach of the vein in which he is working.

When  
meers to be  
set out.

"12. If any miner shall remove any ore from any mine or vein without having duly freed the same, as provided by the eleventh article, or shall commit any trespass in the third meer mentioned in the tenth article, the mine or vein from which the ore shall have been so removed, or of which the meer in which such trespass shall have been committed shall form a part, shall be forfeited to the person for the time being entitled to the mineral duties, and possession thereof may be recovered, as regards the Queen and her successors, or her or their lessees, by action of title in the Small Barmote Court in the name of the barmaster, and so far as regards any other person, by the like action in his own name.

Penalty on  
removing  
ore before  
freeing, or  
commit-  
ting  
trespass.

"13. If any vein shall cross another vein, the miner who comes to the pee or intersection first shall have such pee or intersection, and may work therein as far as he can reach with a pick or hack, such pick or hack having a helve or shaft three-quarters of a yard long, so that he stands wholly within the cheeks of his own vein, when he works such pee or intersection.

Working  
cross veins.

"14. When two veins approach each other, but are parted with a rither, and such veins continue asunder for one meer or further in length without any joint of ore or other mineral crossing the same (such joint of ore or other mineral not being a new vein), and the rither during that distance in all parts exceeds six feet in thickness, then they

Ownership  
of ap-  
proaching  
and con-  
nected  
veins.

are to be considered and treated as two distinct veins so long as they so continue asunder, but whenever they meet the elder or prior title shall take the vein.

Disputes,  
how settled.

“15. In any dispute where the priority of title shall come in question, the longest continued ownership shall prevail; but all gifts from the barmaster shall be considered as the origin and commencement of the title, and workmanship prior to such gift (if any) shall not avail; and in all cases the jury on the trial shall decide the fact of such priority.

Actions at  
law.

“16. If any person shall claim title to any mine, the claimant may commence an action in the Small Barmote Court, by causing a plaint to be entered in the book hereinbefore mentioned; and if any miner shall commit a trespass in the mine or vein of any other person, the person aggrieved may commence an action in the Small Barmote Court, by causing a plaint to be entered in an action of trespass, and may proceed to trial in the Small Barmote Court, and shall there recover possession of the said mine in the action of title or damages, to be assessed by the jury, for the said trespass; and any person claiming a debt against a miner for articles furnished to a mine, or for mining purposes, or for work or labour in, upon, or in respect of any mineral property, may cause a plaint to be entered in an action of debt, and shall annex the particulars of his debt to the summons, and proceed to trial in the Small Barmote Court, and shall there recover such amount (if any) as upon proof shall appear to be due to him; but no evidence shall be admitted of any items in an action of debt not mentioned in the particulars annexed to the summons (r).

“17. No miner or other person shall, except as herein-after mentioned, bring more than one action of title to recover the same mine: provided always, that the steward shall in any case whatever, whether of title, trespass, or debt, have the power, if he shall think fit, to order a new trial to be had, upon such terms as he shall think reasonable, and in the meantime to stay the proceedings.

(r) *Arkwright v. Cantrell*, 7 A. & E. 565.



“18. Every meer of ground shall contain the quantity hereinafter mentioned; that is to say, in the said soke and wapentake, twenty-nine yards; in the manor or liberty of Ashford, twenty-nine yards; in the manors or liberties of Peak Forest, Hartington, Stoney Middleton and Eyam, Litton and Tideswell, thirty-two yards; in the manor or liberty of Crich, twenty-nine yards; and in the manor or liberty of Youldgreave, twenty-eight yards; and the miner shall be entitled to take and have set out for him any proportion of a meer, by payment of an amount of ore proportionate to the amount payable upon freeing a whole meer.

Size of  
meers in  
certain li-  
berties.

“19. The barmaster, if he finds any mine neglected and not wrought, shall, if required so to do by any person or persons, give to the owner or reputed owner and the agent, if any shall be known to him, notice in writing that such mine will, at the expiration of three weeks from the time of serving such notice, if not duly and reasonably worked, be forfeited; and if at the expiration of the said three weeks the mine is not so worked, the barmaster, in the presence of two or more of the grand jury, may give such mine to any person or persons willing to work the same; provided that nothing herein contained shall authorize the barmaster to give away such mine if the owner thereof be unable to work the same by being hindered by water, or for want of air, so long as the owner thereof is using efficient and diligent means to the satisfaction of the barmaster and two or more of the grand jury to relieve such mine.

Unworked  
mines,  
when  
forfeited.

“20. The notice required to be given by the preceding article shall, where the owner or reputed owner and agent, if any, of such mine be known to the barmaster, and be resident within the jurisdiction of the barmaster, be served personally or left at the usual or last known place of abode of such owner or reputed owner and agent; but if such owner or reputed owner or agent be not residing within the jurisdiction of the barmaster, it shall be sufficient to send such notice by post, and to prove the delivery thereof in the same manner as is required by the Act 6 & 7 Vict. cap. 18, with respect to notices of objection therein referred to,

Notice.

and also to affix such notice in manner next hereinafter mentioned ; and when neither the owner nor reputed owner nor the agent of such mine is known to the barmaster, then it shall be sufficient to affix such notice at the place where the last preceding Great Barmote Court was held, and also upon some conspicuous place upon or near such mine.

Partner refusing to work mine to forfeit his share.

“ 21. If any person has shares in a mine and refuses to join his partners or the owners of the other shares in working the same, or to pay his proportion of the expenses of working the same for the space of twenty-one days after the same has been demanded by the party complaining or his agent, he shall forfeit his part and share to his partners, who shall be entitled to recover the same against such defaulting owner in an action of title in the Small Barmote Court, and the only evidence necessary in such action to enable the plaintiff to obtain judgment shall be proof that the plaintiff has worked the said mine, and the amount of the expenses incurred, and a demand of payment of defendant's share thereof as aforesaid (such demand to be in writing, and to be left at the defendant's last known place of abode, if within the jurisdiction of the Barmote Court, but if not, then by affixing the same at the place where the last preceding Great Barmote Court was held, and also on some conspicuous place upon or near such mine), and the neglect or refusal of the defendant to pay it for the space of twenty-one days after the demand ; and it shall be no defence to such action that the plaintiff is partner or joint owner with the defendant in the mine or shares sought to be recovered.

Claimant of mine to try title within six months.

“ 22. If any person be possessed of any mine and be working the same, and any other person claims title thereto, such claimant shall, within the space of three calendar months next after he shall have had notice of the same being in open workmanship, and at all events within six calendar months after the same shall have been in open workmanship, whether he shall have had notice or not, assert his claim by an action of title in the Small Barmote Court, or else such claim shall be barred.

View by grand jury in what cases,

“ 23. If the barmaster shall, in any matter connected with the duties of his office require a view to be made by

the grand jury, or if the plaintiff or defendant in any action of title or trespass in the Small Barmote Court, or if any miner or other person shall, for any purpose, require a view to be made of the mine or works of any person whomsoever, then and in each and every of such cases a view shall be made, and the person so requiring a view shall, when the grand jury are assembled, deliver to the steward a bill of directions describing the mine or particular part or parts of a mine, or ground, or works, or other matters or things, which the grand jury are required to view, and stating the question upon which their opinion is required, but such bill of directions shall contain no argument or comment whatever, and thereupon the steward shall openly read the said bill of directions to the grand jury, and if the same is, in the opinion of the steward, properly framed, deliver it to one of the grand jury, who shall take the same with him for the guidance of himself and the rest of the grand jury in making their view; but if any person affected by the said proceeding object to the said bill of directions or to any cross bill delivered as hereinafter mentioned as containing matter of argument, assertion, or comment, not being a description of the mine, ground, or works, or other matters or things to be viewed, or a statement of the question necessary for the guidance of the grand jury in making their view, the steward, before delivering the bill or cross bill to the grand jury, shall in all cases decide upon the validity of such objections, and if he thinks the same well-founded, shall cause the bill or cross bill to be altered and corrected in such manner as the steward shall think right, and after making such view, such of the grand jury as shall concur in opinion shall in answer to such bill and cross bill, if any, write their opinion and sign it, and such of the grand jury as shall not concur in opinion with any of their fellow jurymen shall write separate opinions, and sign them, so that the signature of each of the grand jury shall be affixed either to his own separate opinion or to that of himself and some other or others of the said grand jury; and the said bill and cross bill, if any, with the opinions, shall be delivered to the

Bill of directions.

Cross bill.

Answer to bill and cross bill.



Notice of  
view.

steward, who shall thereupon openly read the same in the presence of the grand jury and of the person or persons who shall have preferred such bill or cross bill; and such bill and cross bill, if any, and the opinions thereon, shall be kept by the steward with the documents of the Barmote Courts; but the steward shall if required by the plaintiff or defendant in the action in which the view shall have been had, permit such bill and cross bill, if any, and the opinions thereon, or either of them, to be used by such plaintiff or defendant for the purpose of evidence on the trial of the action: Provided always, that no plaintiff or defendant in any action shall be entitled to require a view unless he shall have given notice thereof in writing to the barmaster ten days before the day appointed for the trial; and the expenses of views shall be paid in manner hereinafter mentioned; that is to say, in cases where the barmaster shall require such view, the expense shall be borne by the owner of the mine or other matter to be viewed, provided the steward shall consider that such view was properly required by the barmaster, and shall allow such expenses; and in cases where the view shall be required by a plaintiff or defendant in any action, the expenses of such view shall be costs in the cause, and abide the event of the action; and in all other cases the expenses shall be paid by the person requiring the view, if no cross bill is presented, and if a cross bill is presented, then in equal proportions by the person requiring the view and the person presenting the cross bill; any person who may be affected by the proceedings at any view may appoint a shower to accompany the grand jury, and to show on his behalf the place to be viewed.

Cross bill  
of direc-  
tions.

“24. Any person who may be affected by the opinion of the grand jury on any view may, if he thinks fit, at the same view deliver a bill of directions to the said grand jury, which second bill shall be called a cross bill of directions, in similar form to the original bill, stating the question on which their opinion is requested, and the steward shall, in like manner, immediately after reading the original bill, read over such cross bill, and deliver the same to one of the

grand jury, for the guidance of himself and the rest of the grand jury.

“25. When a bill of directions, and also a cross bill shall be delivered to the grand jury at the same view, it shall not be requisite for them to write their opinions until they have completed the view on the cross bill, unless they think proper to do so, and in no case shall it be competent for the grand jury to examine any evidence produced by either party.

Jury may decide on bill and cross bill at same view.

“26. If any person shall obstruct the grand jury in any view, the grand jury shall state such fact in writing, and return such writing, signed by a majority of them, together with the bill of directions and cross bill, if any, to the steward; and the person so obstructing shall forfeit by way of penalty such sum not exceeding twenty pounds as the steward shall think fit to impose; and the steward shall have power to impose a fresh penalty every day on which such obstruction is repeated; and if any such penalty be not paid within seven days after the same shall be imposed, the steward shall issue his warrant for levying the same. Before imposing any such penalty, the steward shall give to the offender ten clear days’ notice to show cause, at a time and place to be named in such notice, why a penalty should not be imposed.

Penalties for obstructing view, &c.

“27. If any person shall, by virtue of any sough, engine, or other means, unwater or give relief to any mine which may be under water, and the further working thereof thereby hindered, the owner of any such mine so relieved shall, from time to time, so long as such relief be continued, deliver to the person giving such relief as aforesaid such portion of all the ore which at any time thereafter shall be got and raised in such mine under the level at which such relief was given, as the barmaster and grand jury may from time to time fix and determine, such portion of the said ore to be delivered and dressed and made merchantable by the owner of such mine, without any fraudulent concealment or wilful diminution, and to be discharged and free from all charges in getting and dressing; and the value of such ore, if it shall not exceed fifty

Owner to pay for relieving a mine under water.

pounds, may be recovered in the county court, or, if such value shall exceed fifty pounds, in one of the superior courts at Westminster.

Titles of  
contiguous  
mines may  
be consoli-  
dated.

“ 28. Any person having two or more mines or veins lying contiguous to each other, or connected by any shafts, gaits, or ways, may, with the consent in writing of the barmaster and grand jury, consolidate the titles to such veins, and an entry shall be made in the barmaster's book to the effect that the titles to such mines or veins are thenceforth consolidated, and the said mines or veins shall from the time of such entry in the said book be considered and treated as held under one and the new title of the said consolidated veins; and nothing herein contained shall prejudice or affect the right or title of any person to any mine or vein which may have been heretofore united to or consolidated with any other mine or vein; and the possession or working of any of the mines or veins in such consolidated titles respectively shall be considered as the working of the whole thereof, and so long as any part thereof be so worked, the same shall not be liable to be operated upon by the barmaster in pursuance of the 19th article.

As to dis-  
puted work-  
ings.

“ 29. If the grand jury shall be summoned to any view by any person, not being plaintiff or defendant in any action in the Small Barmote Court, for the purpose of delivering their opinion as to whether any other person is working in any mineral ground belonging to the person so summoning the grand jury, and the majority of the grand jury assembled at any such view shall give it as their opinion that such is in all probability the case, but that for want of workmanship the fact does not yet clearly appear, it shall be lawful for the steward to require such other person to give to the steward security for the value of all ore which may be gotten in his workings thenceforth, until such time as sufficient working shall have been done to make the truth appear; and unless security shall be given unto and to the satisfaction of the steward, it shall be lawful for him to direct and authorize the barmaster to retain all ore gotten in the workings of such other person so



failing to give security, until such security shall be given, or until sufficient further working shall have been done to enable the grand jury at any adjourned view to form a satisfactory opinion; and if the grand jury assembled at any such adjourned view, or the majority of those so assembled, shall state their opinion to be that the workings of the person originally summoning the grand jury, and of such other person, form one and the same title, the steward shall thereupon order the barmaster to deliver to the person who shall have originally summoned the grand jury the ore which shall have been so retained as aforesaid, or if security shall have been given as aforesaid, then the person who shall have originally summoned the grand jury shall be entitled to the benefit of such security, to the extent of the value of the ore which shall have been gotten by such other person as aforesaid since the original view, and shall be entitled to use the name of the steward, if necessary, for enforcing such security, and if either party feels himself aggrieved, such party may prosecute his claim in the Small Barmote Court."

The most remarkable feature of the customs in Derbyshire is this—that any of "Her Majesty's subjects" may enter upon any lands of another person (except in certain prohibited places) and search for, sink, and dig mines or veins of lead ore, and have allotted by the barmaster a certain defined spot upon the surface convenient for carrying on mining operations, without even paying compensation to the owner of the surface for the use of the surface. Two principles are involved in this right diametrically opposed to the general law of the land, the first that of allowing a profit to be taken *in alieno solo* under a title by custom (*s*), and not merely by the residents of the district, as in Gloucestershire, but by any British subject; secondly, the exercise of that right without paying compensation for damage to the surface (*t*).

Peculiarity of the Customs in the lead districts.

Profit à prendre in alieno solo without compensation.

(*s*) Ante, pp. 328, 376, 422.

(*t*) Ante, pp. 329, 425.

**Tithes.** Tithes also are payable out of the ores in a dressed state, and before any portion of the ores is assigned to the lord of the manor; whereas it is believed that in no other part of England is the owner of a mine called upon to pay tithes (*u*).

**Coal and iron.** Neither coal, iron, nor any other mineral except lead is subject to any of the customs.

**Water.** There is no customary right to the use of water, or to divert water from its natural course, nor to any artificial watercourse (*v*), the common law of the land prevails unaffected by any local usage (*w*).

### THE COAL AND IRON DISTRICTS.

#### *Barriers—Surface drainage—Water-courses—Way-leaves.*

**Barriers.** THERE are no customs of mining in any of the coal or iron districts, and the general law of the land prevails (*x*). Mr. Dunn, in writing on "Winning and Working of Collieries," says "that there is no legal obligation upon the owner of a mine to leave any barrier against his neighbour's property; therefore, upon circumstances depend the expediency of leaving barriers" (*y*). This is true as an abstract principle, and so far proves the proposition above stated, but, in practice, barriers are left as a mutual protection to adjoining owners, on account of the danger of trespassing upon the rights of others. There are many cases upon this subject referred to in another part of the work (*z*).

**Surface damage.** In *Allaway v. Wagstaff*, Mr. Baron Watson is reported to have said: "The expression *surface damage* is a term

(*u*) *Buxton v. Hutchin*, 2 Vern. 46; 1 Eq. Ca. Ab. 366; *Stile's case*, Litt. Rep. 147; 1 E. & Y. 361; *Brown v. Vermuden*, 1 E. & Y. 509; *Pilkington's Derbyshire*, 111-118; post, "Rating of Mines," p. 515.

(*v*) *Arkwright v. Gell*, 5 M. & W. 203, 228, 233, post, p. 504.

(*w*) Post, p. 484.

(*x*) Ante, pp. 327, 340.

(*y*) Dunn, p. 311 (edit. 2, 1852.)

(*z*) *Clegg v. Dearden*, 17 L.J. Q.B. 233; *Smith v. Kenrick*, 18 L.J. C.P. 172; post, p. 461 et seq.

well known in the north of England, in the colliery districts : it is damage to the crops by using the surface, or by the smoke coming from the colliery works, or pit heaps. \* \* \* It is difficult to say that the injury to the foundations of a house, or the subsidence of the soil partially or wholly destroying the future fertility of the soil is a surface damage; it may be damage to the house and land, but not surface damage." The learned judge has put a very narrow construction upon the term *surface damage* as understood in the colliery districts, and as we venture to suggest not at all in accordance with the generally received opinion. We know of no more restricted interpretation of the expression in the north than in any other of the coal districts, and must therefore direct attention to that part of this work where the general law on *surface damage* is discussed (a).

Custom, says Mr. Dunn, "forms an important element in defining the rights of the miners in the north to water-courses. Where the workings have been in intercommunity for time immemorial there is no remedy to be obtained by the colliery lying to the dip, in respect of any waters raised by the colliery to the rise, in the working of that seam and upon that level, but if the rise colliery should proceed to sink to lower seams, and pump up the water produced by that process to pass through the ancient water-courses, an action would lie, because artificial means had been adverted to in throwing the water upon the dip colliery." The custom referred to by Mr. Dunn is in conformity with the general law of the land, and must not, therefore, be regarded as a local custom (b).

It has been attempted to give a larger interpretation to the terms "way-leaves," "waggon-way," when used in deeds relating to the coal districts of the north, than in other parts of England, but no just ground exists for any departure from the ordinary construction of those terms (c).

(a) Post, pp. 455, 469, 472.

(b) Ante, pp. 327, 340, post, p. 484.

(c) Durham & S. Ry. Co. v. Walker, 2 Q.B. 963, post, p. 512.



## CHAPTER XVII.

## EASEMENTS AND SERVITUDES.

1. THE NATURE AND CHARACTER OF EASEMENTS AND SERVITUDES, AND THE MANNER OF ACQUIRING AND LOSING THEM.
2. THE RIGHT OF SUPPORT TO LANDS, FROM ADJOINING, ADJACENT, AND SUBJACENT LANDS. INJURIES ARISING FROM A WRONGFUL WITHDRAWAL OF SUCH SUPPORT IN THE WORKING OF MINES.
  - SUPPORT TO LANDS.
  - SUPPORT TO BUILDINGS.
  - SUPPORT TO RAILWAYS, PUBLIC WORKS, AND CANALS.
3. OF THE RIGHT TO STREAMS AND WATER-COURSES.
  - NATURAL STREAMS AND WATER-COURSES.
  - DIVERSION AND DEFILEMENT OF WATER.
  - SUBTERRANEAN AND SPRING WATER.
  - ARTIFICIAL WATERS AND WATER-COURSES.
4. RIGHTS OF WAY—WAY-LEAVES.

## SECTION I.

## OF THE NATURE AND CHARACTER OF EASEMENTS AND SERVITUDES, AND THE MANNER OF ACQUIRING AND LOSING THEM.

*The Roman Law—how far adopted by modern States—the Continent generally—the Code Napoleon. America. Easements and Servitudes are incorporeal hereditaments—Definition of easement—servitude. Division of Easements and Servitudes into natural and artificial. How easements and servitudes are acquired,—by grant—prescription or custom; how lost—by surrender—by merger of the dominant and servient tenements—by their becoming useless—by the burden of the servitude being increased—by abandonment. When abandonment is relied upon, is it necessary to prove interruption of the right? How and when Easements and Servitudes are revived. Repairs of Easements. Injuries to Easements. Easements and Servitudes are not to be effected by a declaration of title under 25 § 26 Vic. c. 67.*

Roman  
law.

THE solid and luminous principles of the Roman law must be referred to if we would rightly understand the law

relating to easements and servitudes in this country. From Justinian we learn that the most complete ownership which a person could have over any one thing was where the whole sum of all the rights over that one thing was vested in one person (*plenam in re potestatem*) (*a*), so that the entire use of the thing (*usus*), the enjoyment of all its products (*fructus*), and the destruction or alienation of the thing (*abusus*) (*b*) became attached thereto. This ownership was termed *dominium*, hence the definition *dominium est jus utendi fruendi et abutendi, quatenus juris ratio patitur* (*c*). As opposed to *dominium* was an ownership termed *possessio*. This *possessio* implied not only an actual physical occupation, but also a right to have that possession protected against all the world except the *dominus*, and hence length of possession would sometimes make the possessor the real *dominus*. These combined rights over any one thing were very numerous, but were frequently separated so as to confer some of the rights on one person and some on another; for instance, the right of way over land could be and frequently was separated from a right to the land, and the right of digging under the surface to the surface itself, and such rights might and did often belong to different persons. Each right so separated was considered as a fragment of the whole *dominium*, capable of being disposed of by the possessor; and these fragmentary rights were termed *servitudes*. In some servitudes, the right over the thing subject to the servitude (*res serviens*) was attached to the ownership of another thing (*res dominans*); the servitudes were then known as *servitudes rerum* or *prædiorum*, and a distinction was made in these servitudes according as the right given by them referred to the soil itself, as the right to go or to drive over it, when the *servitudes* were said to be *rusticorum prædiorum*, or to the soil as supporting some superstructure, as a house, when the servitudes were said to be *urbanorum prædiorum*. "In other servitudes, the

Roman  
law.

(*a*) Justinian's Institutes, book ii. title iv. sec. 4.

(*c*) Justinian's Institutes, book ii. title i.

(*b*) Abuti does not mean a bad use of the thing, it is simply opposed to *uti*.

Roman  
law.

right was given to particular persons, and the servitudes were then termed *servitutes personarum*. The most important of these latter servitudes were *usufructus* and *usus*. *Usufructus* was the right to enjoy a thing belonging to another person so as to reap all the produce derivable from it, as, for instance, all the fruits of the soil; *usus* was the right to use and enjoy a thing belonging to another person, only without reaping any of its produce or altering its substance. Only immoveable property was subject to the *servitutes prædiorum*; both moveable and immoveable to the *servitutes personarum*. There were two other real rights which had something of the nature of servitudes, but which received a particular name. These were *emphyteusis* and *superficies*. The former was an alienation of all rights except that of the bare ownership for a long term, in consideration of the proprietor receiving a yearly rent (*pensio*); the latter was the alienation by the owner of the surface of the soil of all rights necessary for building on the surface, a yearly rent being generally reserved" (*d*). In addition to the ordinary method of acquiring these rights, servitudes might also be acquired by a *bonâ fide* possession or quiet enjoyment of them for a certain fixed period, founded on a good title. In Justinian's time the length of possession or enjoyment necessary to confer the right was declared to be three years, for moveables; and ten years if the possessor had resided in the province or twenty years if he resided elsewhere, for immoveables. The servitude might be lost or extinguished by the doing or leaving undone anything inconsistent with the right so acquired. These are the general principles of the Roman law of servitudes, and we now propose to show how far they apply to modern States.

Burge's Commentary on Colonial and Foreign Laws enters very fully into this subject, and the codes of those nations which are based upon the Roman law are extensively considered and ably treated of by that author (*e*). The Continent generally have adopted this branch of Roman law with such alterations only as were necessary to meet the re-

Roman  
law fol-  
lowed by  
modern  
States.

The Conti-  
nent of  
Europe.

(*d*) Justinian's Institutes, by Sanders, p. 45.      (*e*) Vol. ii. p. 400.



quirements of their respective States, but France has been foremost of those nations to hand down to posterity its vital principles in a code which shows the wisdom of its compiler. The Code Napoleon is indeed a great legal work, and will bear comparison with any other of modern times; the 637th to the 701st articles of the code (*f*) describe and enumerate the servitudes known to the French law, among which are the following: 1. The respective rights of the owners of adjacent lands. 2. As respects the waters upon one tenement passing upon or across to the other. 3. Such as are created by law, including party walls and ditches between two estates, party or division hedges dividing lands, and ways answering to ways of necessity at common law. 4. Servitudes created by the act of man, which are divided (in analogy to the civil law) into *urban* and *rural*. 5. Servitudes *continual* and *continuable*, and servitudes *apparent* and *non-apparent*. 6. The mode of creating servitudes, and the rights of the owner of the property to which the servitude is due. 7. The length of possession and enjoyment of continuous and apparent easements in order to create a prescriptive title, the period in such cases being thirty years (*g*).

The Code of Louisiana adopts generally the Roman law (*h*), and in the other States of America the law so far as the same had been adopted in England has been generally although not uniformly followed in those States (*i*). It has been maintained in America that it is not sufficient to be an owner in order to establish a servitude, the owner must be master of his own rights and have the power to alienate; therefore minors, married women, and persons interdicted cannot establish servitudes on their estates except according to the form prescribed for the alienation of their property (*j*).

Having then stated the leading principles of the law of

(*f*) Liv. ii. tit. 4.

(*g*) Fournel Traité des Servitudes, 338, sec. 221; Code Napoleon, Art. 690.

(*h*) Orleans Navigation Company v. New Orleans, 2 Martin (U.S.), p. 269.

(*i*) Kent's Com. vol. iii. p. 601, edit. 1860; Civil Code Louisiana, Articles 642-818.

(*j*) Civ. Code Louisiana, Art. 727; Lalaure, Traité des Servitudes Réelles, p. 34.

Definition  
of an ease-  
ment.

servitudes in the Roman law, on the Continent, and America, it is now proposed to show how far those principles have been recognized in this country. According to our law easements and servitudes are incorporeal hereditaments, and in England, lawyers not unfrequently use the terms indiscriminately, but strictly speaking, a servitude is a burden, whilst an easement is a right; for instance, the right of way which as owner of an estate a man has over the adjoining estate of another, constitutes a servitude upon his neighbour's estate, but it is also an easement to his own estate. An easement, then, is an incorporeal hereditament, and confers on its possessor a privilege, without profit, to be exercised in, over, or within, or to be derived from an hereditament corporeal belonging to another person (*k*). A servitude is a burden imposed upon lands or other heritable property by which the proprietor is either restrained from the full use of the property, or is obliged to suffer another to do certain acts in relation to it either for the utility or accommodation of himself, a third person, or the owner of an adjoining estate, and which, were it not for the burden, it would be competent solely for the owner to do or suffer to be done. Hence it may be perceived that he whose tenement is subject to a servitude is not, in an ordinary case, bound to perform any act himself for the benefit of the person or tenement to which it is due; his whole burden rather consists either in being restrained from doing, or in being obliged to suffer something to be done upon his property by another; in the first case the servitude has been called negative, in the last positive (*l*).

Definition  
of a servi-  
tude.

Division of  
easements  
and servi-  
tudes.

Easements and servitudes may be divided into natural or artificial. Natural, as where one field is higher than another, nature itself may be said to have constituted a servitude on the inferior tenement by which it is obliged and of right entitled to receive the water from the superior (*m*). Artificial,

(*k*) Co. Litt. 9<sup>a</sup> 121<sup>b</sup> Plowd. 170; Blackstone's Com. Stephens's edit. vol. i. p. 171; Rowbotham v. Wilson; Bonomi v. Backhouse, and other cases cited post, pp. 466, 469, 505, 512.

(*l*) Rowbotham v. Wilson, 25 L.J. Q.B. 367.

(*m*) Harris v. Ryding, 5 M. & W. 60; Humphries v. Brogden, 12 Q.B. 739; Solomon v. Vintner's Co. 4 H & N. 585; Bonomi v. Backhouse, Ell. B. & Ell. 622, 642.

as when the owner of a tenement establishes a right to support for some additional burden placed upon his land, as a building (*n*), or to water flowing other than in its natural course (*o*). Servitudes have again been divided into real (predial) or personal. Both real and personal servitudes relate to a thing, and both names are taken, not from the subject burdened, but from that in favour of which the burden is imposed; personal servitudes are constituted principally in favour of a person, and real, principally in favour of the tenement, and only by consequence to a person as the owner of that tenement. In servitudes real, therefore, there must be two tenements, a dominant to which the servitude is due, and a servient which owes the servitude, or is charged with it. Hence servitudes real cannot pass by sale or other just title from the proprietor of the dominant tenement to another, unless the acquirer shall either purchase that tenement, together with the right of servitude, or has already the property in another tenement capable of receiving benefit by it. Thus all servitudes are restraints upon property, they are *stricti juris*, and so not to be inferred by implication. Neither does the law give them countenance, unless they have some tendency to promote the advantage of the dominant tenement, and they must be used in the way least burdensome to the servient tenement; on the other hand, the owner of the servient tenement may make every use of his property consistent with the purposes of the servitude (*p*). Whenever the law gives the right, it gives everything necessary to its exercise (*q*).

Where a servitude is created or an easement granted or reserved by deed, the only question ordinarily open for consideration is the proper construction of the language of the

Title by grant.

(*n*) Case cited above; also *Bateson v. Green*, 5 T.R. 411; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Dodd v. Holme*, 1 Ad. & Ell. 493; *Rogers v. Taylor*, 2 H. & N. 828.

(*o*) *Race v. Ward*, 4 Ell. & B. 702; *Wright v. Howard*, 1 Sim. & S. 190; *Mason v. Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1; *Wood v. Waud*, 3 Ex. 748; *Acton v. Blundell*, 12 M. & W. 347; *Deeble v. Linehan*, 12 Ir. C.L.

1; *Chasemore v. Richards*, 7 H.L. Ca. 349; *Elwell v. Crother*, 31 L.J. Ch. 763.

(*p*) *Erskine's Inst. Scot.* by Ivory, edit. 1828, vol. i. pp. 429, 447.

(*q*) *Co. Litt.* 55<sup>a</sup>, 56<sup>a</sup>, *Hinchliffe v. Ld. Kinnoul*, 5 Bing. N.C. 24; *Allan v. Gomme*, 11 A. & E. 759, s.c. 3 P. & D. 581; *Henning v. Burnet*, 8 Exch. 187.



deed (*r*). But no person who has not an entire interest in the soil, or is under any disability, can create a servitude or grant an easement out of land to another (*s*). This is entirely consistent with the civil law, the law of America, and of France. A parol license or contract cannot create a servitude or confer an easement, because such a license is not sufficient to pass any title to the land (*t*). But a parol license would be a good answer to an action of trespass brought by the person granting it, until such license had been countermanded, but not to such an action if brought by the reversioner (*u*).

Prescription and custom.

The right to a servitude or an easement may be acquired by prescription or custom; in the former case on the supposition of a grant, in the latter by long user. There can be no prescriptive right so large as to preclude the ordinary uses of property (*v*); and there can be no implied grant unless the easement was apparent and continuous, and Mr. Baron Watson, adopting the American authorities as well as our own on the subject, takes the trouble to explain that by "apparent" must be understood "not only those which must necessarily be seen, but those which might be seen or known on a careful inspection by a person ordinarily conversant with the subject" (*w*). The American authorities go so far as to say that "where the enjoyment was in its nature hidden, or although it was apparent, there were no ready means for resisting it within the power of the servient owner, assent was not implied, and the influence of twenty

(*r*) *Shepp. Touchs.* 88, 89; *Orleans Navig. Co. v. New Orleans*, 2 *Martin* (U.S.), 269; *Fentiman v. Smith*, 4 *East*, 107; *Plant v. James*, 5 *B. & Ad.* 791; *Metropolitan Cem. Co. v. Eden*, 16 *C.B.* 42.

(*s*) *Lalauze, Traité des Servitudes Réelles*, p. 34; *Portmore v. Bunn*, 3 *Dowl. & R.* 145; *Barker v. Richardson*, 4 *B. & Ald.* 582.

(*t*) *Fentiman v. Smith*, 4 *East*, 107; *Cocker v. Cowper*, 1 *C. M. & R.* 418; *Bird v. Higginson*, 2 *A. & E.* 696; *Wood v. Leadbitter*, 13 *M. & W.* 838; *Adams v. Andrews*, 15 *Q.B.* 284.

(*u*) *Hewlins v. Shippam*, 5 *B. & C.*

233; *Perry v. Fitzhove*, 8 *Q.B.* 777; *Burling v. Read*, 11 *Q.B.* 907.

(*v*) *Dyce v. Hay*, 1 *Macq.* 305.

(*w*) *Darwin v. Upton*, cited 3 *T.R.* 159; *Campbell v. Wilson*, 3 *East*, 294; *Livett v. Wilson*, 3 *Bing.* 115; *Barker v. Richardson*, 4 *B. & Ald.* 579; *Wilson v. Wilson*, 4 *Dev. (U.S.)*, 154; *Tyler v. Wilkinson*, 4 *Mason (U.S.)*, 397; *Flight v. Thomas*, 11 *Adol. & Ell.* 688; *Harbidge v. Warwick*, 3 *Ex.* 552; *Lockwood v. Wood*, 6 *Q.B.* 50, 64; *Pryer v. Carter*, 26 *L.J. Ex.* 258; *Solomon v. Vintner's Co.* 4 *H. & N.* 602; *Hall v. Lund*, 32 *L.J. Ex.* 113; ante, p. 327.

years' time not acknowledged" (x). And in order to gain a prescriptive right to an easement by long user and enjoyment, the user and enjoyment must have been with the knowledge and acquiescence of him who was seized of an estate of inheritance as owner of the servient estate; what will be evidence of such knowledge and acquiescence depends upon the circumstances of each case. There can be no acquiescence where the act was not capable of interruption (y).

We have already shown how easements and servitudes may be acquired, we now propose to show how they may be surrendered, lost, or extinguished, and revived. They may be surrendered by deed entered into between the respective owners of the dominant and servient estates (z); but a mere parol release of an easement, or an agreement not to exercise it, is no release in law (a), and a parol agreement to substitute a new way for a prescriptive way, though followed by a discontinuance of the use of the prescriptive way, will not amount to a release or even an abandonment of it (b).

How easements are lost.

By surrender.

Servitudes and easements may be lost and extinguished by *confusio*ne—that is to say, whenever the same person becomes the absolute owner both of the dominant and servient tenements so as to cause a merger of the two interests in such one person, for no one can have any easement or servitude in his own land (c); but if a person having a limited interest only in the estate, such as a tenant for life or for years, also becomes possessed of the easement or servitude, the right to the easement or servitude is suspended only, and will be again revived on the termination of such limited interest (d). In the case of *James v. Plant*, Chief

On merger of dominant and servient tenements.

(x) Per Wardlaw, J. in *Napier v. Bulwinkle*, 5 Rich. (U.S.), 311, 324.

(y) *Damel v. North*, 11 East, 372; *Blake v. Everett*, 1 Allen (U.S.), 248; *Webb v. Bird*, 10 C.B. N.S. 282; ante, "Prescription," p. 338.

(z) *Hinchliffe v. Earl Kinnoul*, 5 Bing. N.C. 1; *James v. Plant*, 4 Ad. & Ell. 761; *Worthington v. Gimson*, 29 L.J. Q.B. 116.

(a) *Dyer v. Sanford*, 9 Metc. (U.S.), 395; *Liggins v. Inge*, 7 Bing. 682.

(b) *Reignolds v. Edwards, Willes*, 282; *Lovell v. Smith*, 3 C.B. N.S. 120; *Payne v. Shedden*, 1 Mood. & R. 382; *Carr v. Foster*, 3 Q.B. 581; *Wood v. Leadbitter*, 13 M. & W. 838.

(c) *Pomfret v. Ricroft*, 1 Wms. Saunds, 323<sup>b</sup> (note p). *Bright v. Walker*, 1 Cr. M. & R. 211; *Onley v. Gardiner*, 4 M. & W. 496.

(d) *Erskine's Inst. Scot. Ivory*, edit. 1828. vol. i. p. 450; *Kent's Com.* vol. iii. p. 603, edit. 1860; *Par-*

Justice Tindal said: "We all agree that, where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and that, after such extinguishment, or during such suspension of the right, the way cannot pass as an appurtenant under the ordinary legal sense of that word. We agree also in the principle laid down by the Court of King's Bench, that, in the case of an unity of seisin in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one 'used and enjoyed with the land,' which forms the subject matter of the conveyance." The doctrine as laid down in *James v. Plant* was afterwards confirmed in *Worthington v. Gimson* (e).

When easements are useless.

Servitudes and easements cease when the subject of them happens to be in such a condition that the enjoyment of them can be no longer of any practical use, but they revive when the estate again becomes capable of receiving the servitude, unless after such a lapse of time as to raise a presumption that the servitude had been extinguished. The French law is thus expressed: "Les servitudes cessent lorsque les choses se trouvent en tel état qu'on ne peut plus en user, comme si le fonds dominant et le fonds servant viennent à périr. \* \* \* Mais les servitudes revivent si les choses sont rétablies de manière qu'on puisse en user" (f). On a reference to the authorities of the English (g), Scotch (h), and American (i) laws, we shall there find an agreement with the French on the above doctrine.

dessus, *Traité des Servitudes*, 1 Tom. 411; *Ritger v. Parker*, 8 Cush. (U.S.) 145; *Pearce v. McClenaghan*, 5 Rich. (U.S.) 178; *Hancock v. Wentworth*, 5 Metc. (U.S.) 446; *Hinchliffe v. Earl Kinnoul*, 5 Bing N.C. 1; *Worthington v. Gimson*, 29 L.J. Q.B. 116; *Buckby v. Coles*, 5 Taunt. 311; *James v. Plant*, 4 Ad. & Ell. 761.

(e) 29 L.J. Q.B. 116.

(f) 3 Toullier, *Droit Civil Français*. 522; see Lalaure, *Traité des Servi-*

tudes, 84; Pardessus, *Traité des Servitudes*, 435.

(g) 1 Roll Abr. 934; *Holmes v. Elliott*, 2 Bing. 83; *Garritt v. Sharp*, 3 Ad. & Ell. 330; *National Manure Co. v. Donald*, 4 Hurl. & N. 8 s.c. 28 L.J. Ex. 185.

(h) *Erskine's Inst. Scot. Ivory*, edit. 1828, vol. i. p. 450.

(i) *Chase v. Sutton Manufac. Co.* 4 Cush. 152.



The right to an easement may also become extinguished whenever the owner of the easement so changes the condition of the estate as to increase the burden of the servitude upon the servient estate (*j*); but merely abusing the easement, or using it for purposes for which there was no right to use it, will not be sufficient to extinguish the easement (*k*).

When burdens increased.

The right to an easement may be abandoned by the owner, but the intention to abandon the right must be made manifest. A mere non-user of the easement or a temporary abandonment will not be sufficient. There must be such an act either done or suffered by the owner of the easement as might lead to the reasonable belief that the easement had been permanently abandoned. The law of America (*l*) as well as that of France (*m*) are consonant with the English law upon this subject (*n*). The abandonment of an easement will not be even presumed by a dedication of it to the public unless it clearly appears that the owner thereof intended to release or abandon his own personal and private rights (*o*).

Abandonment of easement.

If the release or abandonment of the right is relied upon, it is not necessary to show an interruption of the right for twenty years. In such a case it is not so much the duration of the cesser to use the private easement as the nature of the act done by the grantees of such easement, or of the adverse act acquiesced in by the grantor, which will generally be the question for consideration. In *Reg. v. Chorley* (*p*), where an application for a new trial was granted on the ground of misdirection on the above points, Lord Denman said: "The learned judge appears to have

When abandonment is relied upon, what interruption of the right must be proved.

(*j*) *Wood v. the Copper Miners' Co.* 14 C.B. 446, 468; *Sharpe v. Hancock*, 7 M. & G. 354.

(*k*) *Mendell v. Delano*, 7 Metc. (U.S.) 176.

(*l*) *Perkins v. Dunham*, 3 Strobb. 224; *Taylor v. Hampton*, 4 M'Cord, 96; *Corning v. Gould*, 16 Wend. 531; *Arnold v. Stevens*, 24 Pick. 106; *Butz v. Ihrie*, 1 Rawle, 218; *Harvie v. Rogers*, 8 Bligh, N.S. 440.

(*m*) *Pardessus*, tom. ii. *Traité des*

*Servitudes*, 202, 456, 478; 2 Fournel, *Traité des Voisinage*, 426.

(*n*) *Co. Litt.* 114<sup>b</sup>; *Lovell v. Smith*, 3 C.B. N.S. 120; *Hale v. Oldroyd*, 14 M. & W. 789; *Ward v. Ward*, 7 Ex. 838; *Moore v. Rawson*, 3 B. & C. 332; *Reg. v. Chorley*, 12 Q.B. 515; *Stokoe v. Singers*, 8 Ell. & B. 31; s.c. 26 L.J. Q.B. 257.

(*o*) *Allen v. Ormond*, 8 East, 4; *Duncan v. Louch*, 6 Q.B. 904.

(*p*) 12 Q.B. 515.

proceeded on the ground that, as twenty years' user in the absence of an express grant would have been necessary for the acquisition of the right, so twenty years' cesser of the use in the absence of any express release was necessary for its loss (*q*). But we apprehend that, as an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time (*r*). For example, this being a right of way to the defendant's malt-house, and the mode of user by driving carts and waggons to an entrance from the lane into the malt-house yard, if the defendant had removed his malt-house, turned the premises to some other use, and walled up the entrance, and then for any considerable period of time acquiesced in the unrestrained use by the public, we conceive that the easement would have been clearly gone. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and what period may be sufficient in any particular case must depend on all the accompanying circumstances. This is the principle on which the judgments of all the members of this court proceeded in *Moore v. Rawson* (*s*), and which was adopted in *Liggins v. Inge* (*t*). It is true that those were cases between two individuals, and not between the public and one individual: but that can make no difference; because, assuming the defendant's to have been the prior right, theirs was the dominant tenement, the lane was the servient tenement: the owner of this last, then, could not dictate absolutely to the public so long as it remained subject to the prior right;

(*q*) *Moore v. Rawson*, 3 B. & C. 332.

(*s*) 3 B. & C. 332.

(*r*) *Parker v. Mitchell*, 11 Ad. & Ell. 788; *Norbury v. Meade*, 3 Bligh, 241.

(*t*) 7 Bing. 682, 693.

he could give nothing but what he himself had, a right of user not inconsistent with the defendant's easement. The question, therefore, Has the owner effectually made an absolute dedication to the public? necessarily involves this, Has the defendant released the right which he enjoyed? And, in the present case, though time would be very material, yet the nature, both of the obstruction at one end by posts, of the user by the public, and the amount of acquiescence by the defendant, were also so material, that the attention of the jury should have been pointedly drawn to them."

If by the unity of title and possession of two estates, the easements or servitudes belonging thereto thereby become extinguished, will a subsequent conveyance of one of the estates only revive the easements or servitudes as they had existed in relation to each estate before they had been extinguished by such unity, or by what line or limit is the rule determined in regard to such easements or servitudes reviving upon the conveyance of one or even both of the estates to different persons other than the person in whom those easements or servitudes became extinguished? The result of the authorities would seem to be, that servitudes and easements which exist *ex jure naturæ*, or such as are necessary to the enjoyment of either of the estates, would revive the instant the ownership and possession of the two estates had passed to different hands, unless something had been done by the owner of either of the two estates when they were jointly held to destroy the easement or servitude. Such is the law as it has been laid down in America (*u*). The American authorities will often assist in the solution of any difficulty arising in similar cases in this country, and have been adopted in some recent decisions in our courts, and further illustrated by showing that an easement will not pass by implication unless it be apparent and continuous; therefore a right of way will not pass by implication upon

How and  
when re-  
vived.

(*u*) *Dunklee v. Wilton R. R. Co.* 5 Rich. 280; *French v. Carhaal*, 1; 4 Foster, 489, 497; *Sury v. Pigot*, Const. 104; *Manning v. Smith*, 2 Poph. 166; *Hazard v. Robinson*, 8 Com. 289. *Mason*, 272; *Ferguson v. Witsell*,



a severance of two estates by deed, unless the deed contains language clearly indicating that the easement was to pass with the estate (*v*).

Repairs of  
easements.

The owner of an easement is legally bound to repair it, and being so bound, he has a right to enter upon and use the land so far as may be necessary to effect such repairs; and if he neglects to make such repairs, the owner of the soil may bring his action against the owner of the easement for neglecting to repair it (*w*). An action is also maintainable for the recovery of damages for the violation of, or for any injury to the easement, although no actual damage may have been sustained, for generally the law will presume damages. But there is a distinction in this country as well as in America between the right to maintain an action for the recovery of damages for the infringement of a private and a public easement; in the former case no damages need have been sustained, in the latter special damages must be proved (*x*). The action may in some cases be brought against the reversioner entitled to the easement, or against the tenant in possession, at the option of the injured party (*y*); and a reversioner may also maintain an action if any injury has been inflicted on the inheritance (*z*). The action is, in its nature, local, but it will lie in any county where damages may have resulted from a wrongful interference with the right (*a*). Courts of law (*b*) as well of equity may grant an injunction to prevent injury to easements; but if the title is in dispute, the title must be first

Remedies  
for injuries  
to ease-  
ments.

(*v*) *Pomfret v. Ricroft*, 1 Wms. Saund. 323<sup>c</sup> (notes); *Clements v. Lambert*, 1 Taunt. 205; *James v. Plant*, 4 Ad. & Ell. 763, *supra*; *Pyer v. Carter*, 26 L.J. Ex. 258; *Glave v. Harding*, 27 L.J. Ex. 286; *Worthington v. Gimson*, 29 L.J. Q.B. 116.

(*w*) *Pomfret v. Ricroft*, 1 Wms. Saund. 322<sup>a</sup>; *Bullard v. Harrison*, 4 M. & S. 387; *Bell v. Twentyman*, 1 Q.B. 766; *Peter v. Daniel*, 5 C.B. 568; *Egremont v. Pulman*, Mood. & M. 404; *Taylor v. Whitehead*, 2 Doug. 749; *Sampson v. Easterby*, 9 B. & C. 505.

(*x*) *Atkins v. Bordmann*, 2 Metc. (U.S.), 457; *Nash v. Peden*, 1 Speers

(U.S.), 17; *Greasley v. Codling*, 2 Bing. 263; *Northam v. Hurley*, 1 Ell. & B. 665.

(*y*) *Todd v. Flight*, 30 L.J. C.P. 21; s.c. 9 C.B. N.S. 377.

(*z*) *Kidgill v. Moor*, 9 C.B. 364; *Metropolitan Association v. Petch*, 5 C.B. N.S. 504; *Baxter v. Taylor*, 4 B. & Ad. 72; *Tucker v. Newman*, 11 A. & E. 40; *Dobson v. Blackmore*, 9 Q.B. 991.

(*a*) *Mersey Navig. Co. v. Douglas*, 2 East, 502; *Barden v. Crocker*, 10 Pick. (U.S.), 383.

(*b*) 17 & 18 Vic. c. 125, s. 79 et seq.

established at law, unless the injury complained of is likely to cause great and permanent mischief (*c*).

If an easement has been injured, the party whose right has been invaded need not seek redress either at law or in equity, but he may take the law into his own hands and abate the nuisance himself (*d*), provided he does no unnecessary damage, commits a breach of the peace, or endangers human life (*e*). Care, too, must be taken that, whilst in the act of removing anything which may have caused the injury, no excess of right be exercised. But it has been held that although life may be endangered, you may nevertheless, after notice, proceed to remove any impediment to the exercise of the right. This was clearly laid down in a case (*f*) where a commoner's right was interfered with by the erection of a building. Wightman, J., said: "The general right of a commoner to abate any building or erection upon the place over which he has the right of common was not questioned, either in this case or in that of *Perry v. Fitzhowe*; but in that case it was held, and for the first time, that, where a declaration in trespass alleged that the defendants pulled down a dwelling-house in which the plaintiff and his family actually were present and inhabiting, a plea justifying as a commoner entitled to abate a building wrongfully erected upon the common, and which did not allege any previous notice or request to move, could not be sustained. There is obviously a wide distinction between the case of parties suddenly coming to the dwelling-house alleged to be a nuisance, and in which the occupier and his family are actually dwelling and in the house, and without notice or demand forcibly pulling it down, and a case in which the occupier of the house has had previous notice and been requested to remove the building, but has

Abatement  
of nui-  
sances to  
easements.

(*c*) Post, "Injunctions."

(*d*) *Batten's case*, 9 Rep. 55; 2 Roll. Abr. Nuisance, p. 144; 3 Black. Com. p. 5, and Stephen's edit. vol. iii. pp. 338, 494; *Lodie v. Arnold*, 2 Salk, 458; *Cooper v. Marshall*, 1 Burr, 261; ante, p. 267.

(*e*) *Hartshorn v. South Reading*, 3 Allen (U.S.), 501; *King v. McCully*, 38 Penn. St. Rep. 76; *Coe v. Lake Co.* (U.S.), 37 N.H. 254; ante, p. 453.

(*f*) *Davies v. Williams*, 16 Q.B. 555; see also *Jones v. Williams*, 11 M. & W. 176; ante, p. 188.

persisted in remaining in the house with his family in defiance of the notice and request. In the case of *Perry v. Fitzhowe* (g), Lord Denman, C.J., asks the counsel for the defendant whether he can maintain pleas which justify pulling down a house in which the plaintiff and his family are actually living, without alleging a previous notice to them to go out. It was unnecessary in that case to give any opinion as to the effect of such an allegation, as the plea did not contain it; but in the present case there is an express allegation both of notice and request, which we think distinguishes this case from that of *Perry v. Fitzhowe*, which was decided wholly upon a question as to the validity of pleas which omitted these most important allegations. As, then, this case is distinguishable from *Perry v. Fitzhowe*, there is nothing to take this case out of the general rule, that a commoner may pull down a building wrongfully erected upon the common, and which prevents his exercising his right as fully as he might otherwise, provided he does no unnecessary damage."

A declaration of title under the 25 & 26 Vic. c. 67 is not to affect any claim or right to easements or servitudes (h).

(g) 8 Q.B. 757 64.

(h) Sec. 29.



## SECTION II.

THE RIGHT OF SUPPORT TO LANDS FROM ADJOINING SUBJACENT AND ADJACENT LANDS. INJURIES ARISING FROM A WRONGFUL WITHDRAWAL OF SUCH SUPPORT IN THE WORKING OF MINES.

SUPPORT TO LANDS.

SUPPORT TO BUILDINGS.

SUPPORT TO RAILWAYS, PUBLIC WORKS, AND CANALS.

## SUPPORT TO LANDS.

*The Roman Law—Code Napoleon, how far recognized. When there are two rights which is subservient to the other?—to what extent minerals may be worked under a reservation of them by deed—prescriptive right—lateral and subjacent support when minerals and the surface are distinct Inheritances—right of support on severance of two estates; adjacent and subjacent support—Result of authorities as to adjoining, adjacent, and subjacent support.*

**QUALIFIED SUPPORT.** *The right of support which primâ facie belongs to the owners of adjoining, subjacent, or adjacent lands may be qualified by circumstances—damages for subsidence.*

**BELONGING** to the class of easements before mentioned, Roman law. is the right of support which one owner of land or strata of minerals is entitled to receive from land or strata of minerals belonging to another owner. To what extent this right can be claimed, and the consequences of withdrawing such support, it is now proposed to consider. The law, as laid down in the Digest, required “that if a man dig a ditch he should leave a space between his own land and that of his neighbours, a space equal to its depth; if he dug a well, he was to leave the space of a fathom” (a). The Code Napoleon prohibited any injury being inflicted on the inferior by the superior tenant. “Le propriétaire supérieur ne peut rien faire qui aggrave la servitude de fonds inférieur” (b). American lawyers have written fully on the support which may be claimed for land, and the Code of Louisiana (c) treats on the subject, and Pardessus (d) ex- Code Na-  
poleon.

(a) L. 13, ff. fin. reg. cited in Barnes v. Ward, 9 C.B. 412.

(b) Code Civil, liv. ii. tit. iv. ch. i. art. 640.

(c) La Civ. Co. arts. 674, 688-691; Kent's Commentaries, part 6, s. 3.

(d) Traité de Servitudes, tom. i. ss. 199-201.

Rolle's  
Abridge-  
ment.

plains the principles applicable to the making of excavations and injuries caused by erections made by owners of adjoining lands. In 2 Rolle's Abridgement, 564, under the title of Trespass, it is said: "If A. seized in fee of copyhold land next adjoining the land of B., and A. erect a new house in his copyhold land, and some part of the house is erected in the confines of his land next adjoining the land of B., if B. afterwards digs his land so near the foundation of A.'s house (but no part of the land of A.) that thereby the foundations of the house and the house itself, fall into the pit, yet no action lies against B., because it was A.'s own fault that he built his house so near B.'s land; for he cannot by his act hinder B. from making the best use of his own land that he can . . . but *semble* that a man who has land next adjoining my land cannot dig his land so near mine that thereby my land shall go into his pit; and, therefore, if the action had been brought for that, it would lie." Sic utere tuo ut non alienum lædas (*e*). The same doctrine was recognized by Chief Baron Comyns (*f*); by Lord Tenterden, in *Wyatt v. Harrison* (*g*); by Lord Campbell, in *Humphries v. Brogden* (*h*); and by other eminent judges in subsequent cases, as will appear from the authorities. The application of the doctrine to particular circumstances is the difficulty which the lawyer has to contend with.

Bateson v.  
Green.

In *Bateson v. Green* (*i*), where a dispute arose between the lord of the manor and the commoners as to the right of the lord to interfere with the substrata, Buller, J., said: "Where there are two distinct rights, claimed by different parties, which encroach on each other in the enjoyment of them, the question is which of the two rights is subservient to the other?" In that case it was held that the interest of the commoners was subservient to that of the lord, and therefore the lord might dig clay-pits on the common, or

(*e*) *Hunt v. Peake*, 29 L.J. Ch. 787.

(*f*) Comyns, Dig. Action upon the Case for a Nuisance, A.

(*g*) 8 B. & Ad. 871, 876.

(*h*) 12 Q.B. 739.

(*i*) 5 T.R. 411.

empower others to do so, without leaving sufficient herbage for the commoners.

In *Peyton v. the Mayor, &c., of London* (*j*), the easement there claimed was a right of support of one *building* from another building, which could arise only from a grant actual or implied; and in that case Lord Tenterden said: "The declaration in this case does not allege, as a fact, that the plaintiffs were entitled to have their house supported by the defendants' house, nor does it, in our opinion, contain any allegation from which a title to such support can be inferred as a matter of law." This case shows the necessity of introducing into the pleadings of an action an averment that the plaintiff was entitled to the easement as a right, but it does not go any further.

*Peyton v.*  
*Mayor of*  
*London.*

*Wyatt v. Harrison* decided that the owner of a house recently erected on the extremity of his land could not maintain an action against the owner of the adjoining land for digging in his own land so near to the plaintiff's house that the house fell down: but the reason given was that the plaintiff could not, by putting an additional weight upon his land, and so increasing the lateral pressure upon the defendant's land, render unlawful any operation in the defendant's land which before would have caused no damage; and the court intimated an opinion that the action would have been maintainable, not only if the defendant's digging would have made the plaintiff's land crumble down unloaded by any building, but even if the house had stood twenty years (*k*). Where a house had been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house (*l*).

*Wyatt v.*  
*Harrison.*

In *Dodd v. Holme* the right of owners of property to have their lands or houses supported by the adjoining premises was again discussed; but that case turned upon an allegation in the declaration that the defendants dug

*Dodd v.*  
*Holme.*

(*j*) 9 B. & C. 725.

(*k*) 8 B. & Ad. 871.

(*l*) *Stansell v. Jollard*, 1 Selw. Ni.

Pri. 457 (11th ed.); *Hide v. Thornborough*, 2 Carr. & Kir. 250.



"carelessly, negligently, unskilfully, and improperly," whereby "the foundations and walls" of the plaintiff's house "gave way." The plaintiff's house was proved to have been in a very bad condition; but Lord Denman, in his judgment, intimated that the defendant had no right on that account to accelerate its fall, and that the plaintiff was entitled to recover damages in proportion to the loss actually sustained consequent upon the defendant's negligence, and independently of the question whether twenty years' occupation was essential to entitle the plaintiff to support from the house adjoining; although Littledale, J., in the same case, pronounced an opinion in favour of a house which had stood twenty years being regarded as an "ancient" house, consequently entitled to support (*m*).

Partridge  
v. Scott.

The Court of Exchequer, in *Partridge v. Scott*, concurred in the law before laid down in the Court of Queen's Bench, that a right to the support of the foundation of a house from adjoining land belonging to another proprietor can only be acquired by grant, and that where the house was built on excavated land, a grant is not to be presumed till the house has stood twenty years after notice of the excavation to the person supposed to have made the grant; but nothing fell from any of the judges questioning the right to support which land, while it remains in its natural state, has been said to be entitled to from the adjoining land of another proprietor. Some land of the plaintiff's not covered with buildings had likewise sunk, in consequence of the defendant's operations in his own land: but the court, in directing a verdict to be entered for the defendant on the whole declaration, seems to have thought that the sinking of the plaintiff's land was consequential upon the fall of the houses, or would not have taken place if his own land had not been excavated (*n*).

Chadwick  
v. Trower.

The judges in the Exchequer Chamber held, upon a writ of error from the Court of Common Pleas, in *Chad-*

(*m*) 1 A. & E. 493; see also Jeffries v. Williams, 5 Ex. 792, s.c. 20 L.J. Ex. 14.      (*n*) 3 M. & W. 220; Hunt v. Peake, John. 705.

wick v. Trower (o), that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall which rests upon it, and that he is not even liable for carelessly pulling down his wall, if he had not notice of the existence of the adjoining wall; but this decision proceeds upon the want of any allegation or proof of a right of the plaintiff to have his wall supported by the defendant's, and does not touch the rights or obligations of adjoining proprietors, where the tenement to be supported remains in its natural condition.

Next comes the valuable case of Harris v. Ryding, which is a direct authority in favour of the right of the owner of the surface to support from the substrata, notwithstanding some uncertainty as to the effect of the averment, in the declaration, of working "*carelessly, negligently, and improperly.*" The facts of the case appear to be these: A. being seized in fee of certain lands, conveyed away the surface to B., reserving to himself the minerals, with power to enter upon the surface to work them; and it was held, that, under this reservation, A. was not entitled to take all the minerals, but only so much of them as could be taken away, leaving a reasonable support to the surface (p). The judgment in the case was given upon a demurrer to certain pleas justifying under the reservation, and all the judges, in the very comprehensive and masterly judgment which they delivered, seriatim, seem to have thought that the reservation of the minerals would not have justified the defendant in depriving the surface of a complete support, however carefully he might have proceeded in removing them. Lord Abinger says: "The plea is no answer, because it does not set forth any sufficient ground to justify the defendants in working the mines in such a manner as not to leave sufficient support for the land above, which is alleged by the declaration to be a careless, negligent, and improper mode of working them." Parke, B., observes: It never could have been in the contempla-

Harris v.  
Ryding.

(o) 6 New Ca. 1; See Trower v. Chadwick, 3 New Ca. 334.

(p) 5 M. & W. p. 60; s.c. 8 L.J. N.S. Ex. 181.

Reservation  
of minerals  
by deed.

Right to  
work  
minerals  
under a re-  
servation.

tion of the parties "that, by virtue of this reservation of the mines, the grantor should be entitled to take the whole of the coal and let down the surface, or hinder the enjoyment of it; it is very like the case of a grant of an upper room in a house, with the reservation by the grantor of a lower room, he undertaking not to do anything which would derogate from the right to occupy the upper room." And again: "This plea is clearly bad, because the defendants do not assign that in taking away the coal they did leave a sufficient support for the surface in its then state." The question is, says Alderson, B., "Whether the grantor is not to get the minerals which belong to him, and which he has reserved to himself the right of getting, in that reasonable and ordinary mode in which he would be authorized to get them, provided he leaves a proper support for the land which the other party is to enjoy." Maule, J., says: The right of the defendants "to get the mines is the right of the mine-owners, as against the owner of the land which is above it. That right appears to me to be very analogous to that of a person having a room in a house over another man's room, or an acre of land adjoining another man's acre of land." Parke, B., that he might not be misunderstood as to the right of the owner of the surface, afterwards adds: "I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support." It seems, therefore, to have been the unanimous opinion of the court that there existed the natural easement of support for the upper soil from the soil beneath, and that the entire removal of the inferior strata, however skilfully done, would be actionable, if productive of damage by withdrawing that degree of support to which the owner of the surface was entitled, the duty of the owner of the servient tenement forbidding him to do any act whereby the enjoyment of the easement could be disturbed (*q*).

Acton v.  
Blundell.

In the case of *Acton v. Blundell* it was held, that a landowner, who, by mining operations in his own lands, directs a subterraneous current of water, is not liable to an



action at the suit of the owner of the adjoining land, whose well is thereby laid dry; but the right to running water and the right to have land supported are so totally distinct, and depend upon such different principles, that there can be no occasion to show at greater length how the decision is inapplicable (*r*).

We have now to mention the case of *Hilton v. Lord Granville*. The court there held, that a prescription or a custom within a manor for the lord, who is seized in fee of the mines and collieries therein, to work them under any dwelling-houses, buildings, and lands, parcel of the manor, doing no unnecessary damage, and paying to the tenants and occupiers of the surface of the lands damaged thereby a reasonable compensation for the use of the surface of the lands, but without making compensation for any damage occasioned to any dwelling-houses or other buildings within or parcel of the manor by or for the purpose of working the said mines and collieries, is void as being unreasonable. Lord Denman, C.J., said: "A claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument" (*s*). This case has since been commented upon by Lord Campbell, in the case of *Rowbotham v. Wilson* (*t*), and by Chief Justice Cockburn, in *Blackett v. Bradley* (*u*).

In the more recent case of *Smith v. Kenrick*, the Court of Common Pleas, after great deliberation, held, that it is the right of each of the owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his own mine, in the manner which he deems most convenient and beneficial to himself, although the natural

(*r*) 12 M. & W. 324.

(*s*) 5 Q.B. 701.

(*t*) 25 L.J. Q.B. 367; 27 L.J.

Q.B. 61; 8 H. of Lords' Cases, 348.

(*u*) 31 L.J. Q.B. 67.

consequence may be that some prejudice will accrue to the owner of the adjoining mine; so that such prejudice does not arise from the negligent or malicious conduct of his neighbour; but, in the elaborate judgment of the court, delivered by Mr. Justice Cresswell, there is nothing laid down to countenance the doctrine that the owner of the minerals may, if not chargeable with malice or negligence, remove the minerals so as to destroy or damage the surface over them which belongs to another (v).

Humphries  
v. Brogden.

The leading case of *Humphries v. Brogden* next claims notice. There, Lord Campbell (w), after reviewing most of the authorities we have referred to (x), in conjunction with the Roman law, the Code Napoleon, and the treatises by American lawyers, in the course of a remarkably luminous judgment, says that the "right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years, or any longer period. *Pari ratione*, where there are separate freeholds from the surface of the land, and the minerals belonging to different owners, we are of opinion that the owner of the surface, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata may of course be removed by the owner of them, so that a sufficient support for the surface is left; but if the surface subsides and is injured by the removal of these strata, although, on the supposition that the surface and the minerals belong to the same owner, the operation may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sus-

Lateral  
support.

Subjacent  
support.

(v) 7 Com. B. 515, 564.

(w) 12 Q.B. 744; s.c. 20 L.J. N.S. Q.B. 10.

(x) See also *Jeffries v. Williams*, 5

Ex. 792; *Hilton v. Whitehead*, 12 Q.B. 734; *Earl of Glasgow v. The Hurler Co.* 3 Ho. L. Cases, 25.

tained by the subsidence. Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which it is entitled from the adjoining surface close, it cannot be securely enjoyed as property; and under certain circumstances, as where the mineral strata approach the surface and are of great thickness, it might be entirely destroyed. We likewise think that the rule, giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation, or covenant, must be laid down generally without reference to the nature of the strata or the difficulty of propping up the surface, or the comparative value of the surface and the minerals. We are not aware of any principle upon which qualifications could be added to the rule; and the attempt to introduce them would lead to uncertainty and litigation: greater inconvenience cannot arise from this rule, in any case, than that which may be experienced where the surface belongs to one owner, and the minerals to another, who cannot take any portion of them without the consent of the owner of the surface. In such cases, a hope of reciprocal advantage will bring about a compromise, advantageous to the parties and to the public. Something has been said of a right to a reasonable support for the surface; but we cannot measure out degrees to which the right may extend; and the only reasonable support is, that which will protect the surface from subsidence and keep it securely at its ancient and natural level. The defendant's counsel have argued that the analogy as to the support to which one superficial close is entitled from the adjoining superficial close, cannot apply where the surface and the minerals are separate tenements belonging to different owners, because there must have been unity of title of the surface and the minerals, and the rights of the parties must depend upon the contents of the deeds by which they were severed. But, in contemplation of law, all property in land having been in the crown, it is easy to conceive that, at the same time, the original grant of the surface was made to one, and the minerals under it to another, without any express grant or reservation of any easement.

When the minerals and surface are distinct inheritances.



When there  
are distinct  
titles to  
minerals  
and the  
surface.

Suppose, what has generally been the fact, that there has been in a subject unity of title from the surface to the centre; if the surface and the minerals are vested in different owners, without any deeds appearing to regulate their respective rights, we see no difficulty in presuming that the severance took place in a manner which would confer upon the owner of the surface a right to the support of the minerals. If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface; and if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed. Perhaps it may be said that, if the grantor of the minerals, reserving the surface, seeks to limit the right of the grantee to remove them, he is acting in derogation of his grant, and is seeking to hinder the grantee from doing what he likes with his own; but, generally speaking, mines may be profitably worked, leaving a support to the surface by pillars or ribs of the minerals, although not so profitably as if the whole of the minerals be removed; and a man must so use his own as not to injure his neighbour. The books of reports abound with decisions restraining a man's acts upon and with his own property, where the necessary or probable consequence of such acts is to do damage to others. The case of common occurrence nearest to the present is, where the upper story of a house belongs to one man, and the lower to another. The owner of the upper story, without any express grant or enjoyment for any given time, has a right to the support of the lower story. If this arises (as has been said) from an implied grant or covenant, why is not a similar grant or covenant to be implied in favour of the owner of the surface of land against the owner of the minerals? If the owner of an entire house, conveying away the lower story only, is, without any express reservation, entitled to the support of the lower story for the benefit of the upper story, why should

not an owner of land, who conveys away the minerals only, be entitled to the support of the minerals for the benefit of the surface?"

Here it must be observed, that there were several cases relating to canals and railways decided previously to *Humphries v. Brogden*, which were not referred to by Lord Campbell in his judgment in the latter case. The omission is to be regretted, 1st, because the railway and canal cases (*y*) had established a somewhat different principle, and, 2ndly, because the omission has led to a distinction being preserved, as to the extent of adjoining, adjacent, and subjacent support to lands, purchased for public works, and those purchased by private individuals, with a reservation of the minerals. Nevertheless the principle, that the owner of the surface of private lands is entitled to the support of the subjacent strata, as was laid down by Lord Campbell in *Humphries v. Brogden*, was afterwards adopted in *Smart v. Morton*, notwithstanding that in the latter case there was a power given by deed to work coal beneath the surface on payment of treble of the damages, loss, or prejudice which the surface-owner might sustain by such working (*z*). The same principle was carried even further in *Roberts v. Haines* (*a*); in that case an Enclosure Act provided that the lord of the manor should have power to enter upon the waste lands allotted by the Act, and dig for and get minerals, and erect works for the purpose, making satisfaction to the persons whose allotments should be thereby damaged or injured; another clause provided, that the lord should upon no account open, dig, or carry on any work on the surface within forty yards of any dwelling-house, or get any coal under any dwelling-house within the perpendicular distance of forty yards; and power was given to persons entitled to dwelling-houses to inspect the mines, in order to see whether works were carried on within the prohibited distance; and it was held, that the effect of these clauses, was to give the lord a right of entering upon the

*Smart v. Morton.*

*Roberts v. Haines.*

(*y*) Ante, p. 196, post, p. 476.

(*a*) 25 L.J. Q.B. 353, s.c. 27 L.J.

(*z*) 5 Ell. & B. 30, s.c. 24 L.J. Ex. 49; 6 Ell. & B. 643; 7 Ell. & B. Q.B. 260. 625.

surface of the allotments, making compensation for surface damage, subject to an absolute prohibition against working at all within forty yards of a dwelling-house; but that it left the common law rights of the allottees untouched in other respects; and therefore that the lord was liable to an action for working the mines so as to cause the surface to subside, although the works were carried on in a proper and usual manner, and not within the prohibited distance.

Row-  
botham v.  
Wilson.

The right of support *ex jure nature* which the owner of the soil is entitled to receive from the minerals underneath, was again maintained in *Rowbotham v. Wilson* (b); and in *Dugdale v. Robertson* it was held, that if the owner of lands grant a lease of the minerals beneath the land, with power to work and get them in the most general terms, still the lessee must leave a reasonable support for the surface (c), and so conversely where the minerals are demised, and the surface is retained by the lessor, there arises a *primâ facie* inference at common law upon every such demise, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right of support, and when delivering judgment in the last-mentioned case Vice-Chancellor Wood expressed his full and unqualified assent to the principle laid down in *Harris v. Ryding*, *Smart v. Morton*, and other cases before referred to, of the same description.

Dugdale v.  
Robertson.

Reserva-  
tion  
clauses.

Rogers v.  
Taylor.

In *Rogers v. Taylor* (d) it seems to have been admitted that the same rule of construction which was adopted in *Harris v. Ryding* applies in the case of a grant of land by the crown, excepting the minerals; but the court further decided that if the surface falls in from the working of the minerals, by reason of a messuage having been built thereon, if the messuage had been built upwards of twenty years, the mine-owner is answerable for the damage.

Caledonian  
Ry. Co. v.  
Sprot.

In the case of the *Caledonian Railway Company v. Sprot* the same doctrine was again maintained, and a further illustration of the right to adjacent and subjacent

(b) 8 H.L. Ca. 348.

(c) 8 K. & J. 695; see also *Pennington v. Galland*, 9 Ex. 1.

(d) 2 H & N. 928.



support on a reservation of minerals, was given. If, as it was held, the owner of a house were to convey the upper story to a purchaser, reserving all below the upper story, such purchaser would, on general principles, have a right to prevent the owner of the lower story from interfering with the walls and beams upon which the upper story rests, so as to prevent them from affording proper support. The same principle applies to the case of adjacent support, so far, at all events, as to prevent a person who has granted part of his land from so dealing with that which he retains, as to cause that which he has granted to sink or fall. How far such adjacent support must extend is a question which in each particular case will depend on its own special circumstances. If the line dividing that which is granted from that which is retained, traverses a quarry of hard stone or marble, it may be that no adjacent support at all is necessary. If, on the other hand, it traverses a bed of sand, or a marsh, or a loose gravelly soil, it may be that a considerable breadth of support is necessary to prevent the land granted from falling away upon the soil of what is retained. Again, if the surface of the land granted is merely a common meadow or a ploughed field, the necessity for support will probably be much less than if it were covered with buildings or trees. And it must further be observed, that all which a grantor can reasonably be considered to grant or warrant is such a measure of support, subjacent or adjacent, as is necessary for the land in its condition at the time of the grant, or in the state for the purpose of putting it into which the grant is made (*e*). Thus, if I grant a meadow to another, retaining both the minerals under it, and also the adjoining lands, I am bound so to work my mines and to dig my adjoining land as not to cause the meadow to sink or fall away. But if I do this, and the grantee thinks fit to build a house on the edge of the land he has acquired, he cannot complain of my workings or diggings, if by reason of the additional weight he has put on the land they cause his house to fall. If, indeed, the grant is

Right of support on severance of two estates.

Adjacent support.

Subjacent and adjacent support.

(*e*) *Harris v. Ryding*, ante, p. 459.

made expressly to enable the grantee to build his house on the land granted, then there is an implied warranty of support, subjacent and adjacent, as if the house already existed (*f*).

*Bonomi v. Backhouse.* In the subsequent case of *Bonomi and Uxor v. Back-*

house the above decisions were adopted, and it was again held, that the right of the owner of the surface to the support of the underground strata under and near to his land was one of the ordinary natural rights of property incidental to all land, and not an easement or right acquired by grant or otherwise (*g*). In *Allaway v. Wagstaff*, where

*Allaway v. Wagstaff.*

it appeared that Her Majesty the Queen was seized in fee of the Forest of Dean, in Gloucestershire, including the mines and minerals, subject to the rights and privileges of certain persons to work the mines and quarries, it was held by the court, on the authority of *Humphries v. Brogden*, that the persons entitled to work the mines were bound to leave a sufficient support for the surface (*h*). The

*Hunt v. Peake.*

same doctrine was again maintained in the case of *Hunt v. Peake* (*i*), wherein Vice-Chancellor Wood said: "That any person working the earth, either by direct excavation of the surface or by underground workings, although in his own soil, must so work it as not to occasion the subsidence of the original soil of his neighbour; that is to say, every man who is the owner of the land is entitled to have his land supported as it stands in the state of nature." And the

*Browne v. Robins.*

recent cases of *Browne v. Robins* (*j*), not only maintains the same doctrine, but goes even further, and decides that when mines are worked under land adjacent, but not adjoining, so as to cause the soil intervening to give way, and thus indirectly to cause also the surrounding soil and houses built thereon to give way, damages may not only be recovered for the falling in of the surrounding soil, but for houses also which had been erected thereon more than twenty years; and *Watson, B.*, in the case, admitted that the right to adjacent support may in certain cases raise

(*f*) 2 Macq. 449; see also *Caledonian Rail. Co. v. Belhaven*, 3 Macq. 56.

(*g*) 27 L.J. Q.B. 378; 28 L.J. Q.B. 378.

(*h*) 4 Hurl. & N. 307, 681.

(*i*) 29 L.J. Ch. 786.

(*j*) 28 L.J. Ex. 250.

nice questions, which did not, however, arise in that case. In *Hamer v. Knowles* the same doctrine as to the right of lateral support from the intervening soil was upheld; and Pollock, C.B., said the right of support was not interfered with by buildings being erected upon the farm, if their being upon the land did not contribute to the subsidence (*k*).

The recent judgment in the case of *Elliot v. the North-Eastern Railway Company*, to be presently mentioned (*l*), has not interfered with the authorities already referred to; and upon a consideration of all the cases, it is submitted that the right of the owner of the surface to support for his lands from the adjoining and subjacent soil and minerals, and in some cases from the adjacent soil also, is clearly established; so that whenever the freehold of the soil is distinct, or not blended with the freehold of the minerals, or the title to two or more veins or seams of coal under the same lands are vested in different persons, whether the veins are situated perpendicularly the one over the other, or intersect each other, the respective owners must so conduct their mining operations as not to interfere with the rights of his neighbour. Each owner must, in fact, so explore the ground as not to deprive his neighbour of that support which by the law of England, in analogy to the Roman law, he is undoubtedly entitled to receive. "Sic utere tuo ut non alienum lædas."

*Hamer v. Knowles.*

Result of authorities as to adjoining adjacent and subjacent support.

But the title of the owner of the surface or the under-surface may be so acquired as to qualify the *primâ facie* right to support from the adjoining or subjacent strata, which we have been discussing in the preceding pages. This doctrine was clearly laid down by Lord Campbell in *Rowbotham v. Wilson* (*m*). In that case there was an enclosure of lands, under an Act of Parliament, when it was agreed, by deed, by and between certain owners of allotments, that the minerals under their respective allotments should be allotted to others, with power for them to get

Right of support may be qualified.

*Rowbotham v. Wilson.*

(*k*) 30 L.J. Ex. 102.

(*l*) Post, p. 478.

(*m*) 8 H.L. Ca. 348.



Row-  
botham v.  
Wilson.

the minerals without regard to the surface, and without compensation, and Lord Campbell held, and is reported to have said: "We adhere to the doctrine laid down by this court in *Humphries v. Brogden* (*n*), that where the surface of land and the minerals under it are held as separate tenements by different owners, of common right the owner of the surface is entitled to support from the subjacent strata, without reference to the nature of the strata or the difficulty of propping up the surface. But we there expressly guarded ourselves against the supposition that we intended 'to lay down any rule applicable to a case where the *primâ facie* rights and liabilities of the owner of the surface of the land and of the subjacent strata are varied by the production of title-deeds or by other evidence.' In the present case we are of opinion that there is evidence to show that upon the severance of the surface and the minerals, the owner of the surface took it as a separate tenement, without that continuing and unqualified right to support from the subjacent strata, to which the owner of the surface would be *primâ facie* entitled. He had an easement for the support of the surface, but it was of a qualified character. There was a servitude imposed upon the owner of the minerals, but this servitude was likewise of a qualified character. Both easement and servitude were subject to the right of the owner of the minerals to work and get them in a careful manner, although the surface might thereby be injured. The owner of the surface had it conveyed to him with this qualified easement only, and with this qualified easement he was contented to accept it. Notwithstanding some expressions of Lord Denman in *Hilton v. Lord Granville* (*o*), we are of opinion that upon the severance of the surface of the minerals into separate tenements to be held by different owners, such an arrangement might effectually be made as to the right of support to the surface from the minerals. There is here nothing in derogation of the grant of the surface. The grantee of the surface may still hold in fee simple with all the rights and incidents belonging to that estate. He would not have

(*n*) Ante, p. 462.

(*o*) Ante, p. 461.

the perfect easement of support from the minerals, but this (as must be supposed for valuable consideration) he has been contented to waive; and he takes his tenement with an easement of support of a qualified character. No deceit is practised upon him, and no attempt is made to create an estate in law without the usual incidents belonging to that estate. Therefore no rule of law is violated. In *Hilton v. Lord Granville* (*p*) as well as in *Harris v. Ryding* (*q*), and in *Smart v. Morton* (*r*), it is taken for granted that such an arrangement would be valid, the owner of the minerals making compensation *toties quoties* to the owner of the surface for the damage done to the surface in working the minerals, but surely it can make no difference whether the owner of the surface is to be indemnified by subsequent payments or by an advantage conferred upon him in respect of price which he pays, or by the extended area which he obtains in consideration of the loss or inconvenience to which he may afterwards be subject from the subsidence of the surface by the working of the minerals. On these principles the original allottee of the land acquired his tenement, with only the qualified right of support from the minerals, and he could have maintained no action against the allottee of the minerals for working them in a careful manner." The above-mentioned case of *Rowbotham v. Wilson* afterwards came before the Exchequer Chamber, and although the judgment of the court below was affirmed, the judges differed in opinion, but the case again came before the House of Lords, when the judges were unanimously in favour of the judgment previously delivered by Lord Campbell in the Queen's Bench (*s*). The special circumstances connected with the rights of the lord of the manor and the allottees of waste lands, did, in a great measure, govern the case of *Roberts v. Haines* before referred to (*t*); and in the case of the North-Eastern Railway Company *v. Elliott*, it was held, that although, as between conterminous owners, the lateral support of a neighbour's soil can only be claimed for the surface of the land

North-  
Eastern  
Ry. Co. *v.*  
Elliott.

(*p*) Ante, p. 461.

(*q*) Ante, p. 459.

(*r*) Ante, p. 465.

(*s*) Ante, p. 469.

(*t*) Ante, p. 465.

in its natural state, yet where a person sells land to another to be used for an express purpose, he will not be allowed to derogate from his own grant by doing anything in the adjacent soil which unfits the land sold for the purpose for which it was sold; and it makes no difference that the land so sold was taken under compulsory powers; but a purchaser is not entitled to any additional support afforded by the accidental state in which the adjacent soil happens to be at the time of the purchase, however long it may have been in that state prior to the purchase. Thus, where the owner of a drowned mine sold land to a railway company for the purpose of building a bridge, and the land sold derived additional support from the water in the mine, it was held that the railway company were not entitled to restrain him from pumping out the water, and restoring the mine to a working condition, although the mine had continued in its drowned state, and the works had been abandoned for a period of forty years prior to the purchase (*u*). In the case of *Croft v. London and North-Western Railway Company*, it was held that damages which were likely to accrue from subsidence, and might have been foreseen when a grant to interfere with the sub-strata was given, were not recoverable (*v*).

Compensation for unforeseen damages.

#### SUPPORT TO BUILDINGS.

*The right of support to land is not necessarily extended to buildings. When the soil is overloaded—Wyatt v. Harison—Gayford v. Nicholls—Solomon v. Vintners' Company—Sprot v. Caledonian Railway Company. When the buildings did not cause the subsidence—Hunt v. Peake—Hamer v. Knowles. Support through an intermediate house—Solomon v. Vintners' Company. Prescriptive right to support—Stansell v. Jollard—Hill v. Thornborough—Dodd v. Holme—Partridge v. Scott—Rogers v. Taylor—Browne v. Robins—Bibby v. Carter—Hunt v. Peake—Humphries v. Brogden—Bonomi v. Backhouse—Solomon v. Vintners' Company—Berkley v. Shafto—constructive support.*

No right (ex jure naturæ) of support to buildings.

THE right of support which the owner of one parcel of land is entitled to receive from the owner of another parcel, does not apply in all its bearings, as is apparent from the

(*u*) *Elliot v. North-Eastern Rail. Co.*, ante, p. 469, post, p. 478.      (*v*) 32 L.J. Q.B. 113.



before-mentioned cases, to houses and buildings erected upon the surface. As respects the land, the ground is entitled to support *ex jure naturæ*; but the right of support which the houses and buildings are entitled to receive, is an incident arising out of the right of support attached to the soil, and can only be claimed either by grant, or by prescription which presumes a grant. Even when the right exists, the owner of the soil is not liable in all cases for damages which may ensue to such erections in consequence of excavations or mining operations carried on beneath the soil provided he was only making a reasonable use of the sub-strata. For instance, where a man builds a house at the extremity of his own land, he does not thereby acquire any right of support from his neighbour's land, unless he has some grant to that effect; so that the owner of the adjoining land will be justified in excavating his own land for mining or any other purpose, even although by so doing, he takes away the support necessary to uphold his neighbour's house (*w*). A man has no right, in fact, so to load his own soil as to make it require the support of his neighbour's (*x*). But if the buildings which had been erected at the extremity of the land did not cause or contribute to the subsidence of the soil, then damage for the fall of the buildings is recoverable for the loss thereby sustained as part and parcel of the loss occasioned by the subsiding of the soil. In *Hunt v. Peake*, Vice-Chancellor Wood said: "It is the ground that needs support; the ground has fallen, and they had a right to have the ground supported as it stood, and to put anything upon the ground they thought fit, upon the supposition of its being supported by their neighbours' land" (*y*). And Chief Baron Pollock, in delivering judgment in *Hamer v. Knowles*, observed: "It was said the plaintiff had no right of support for buildings, but we think that if their being there did not contribute to the subsidence, the plaintiff is entitled to damages for in-

When the surface is overloaded.

When buildings did not cause the subsidence.

(*w*) Rol. Ab. title Trespass, ante, p. 456.

(*x*) *Wyatt v. Harrison*, ante, p. 457; *Gayford v. Nicholls*, 28 L.J. Ex. 205, s.c. 9 Ex. 702; *Solomon v.*

*Vintners' Co.* 28 L.J. Ex. 370; *Sprot v. Caledonian Railway Co.*; *Browne v. Robins*; *Hamer v. Knowles*, ante, pp. 468, 469.

(*y*) 29 L.J. Ch. 785; ante, p. 468.

juries to them through the defendant's wrongful act in causing the ground on which they stood to subside" (z).

Support  
through an  
interme-  
diate house.

And there is no right of support through an intermediate house; so that where there are three contiguous houses, if the owner of the first in removing his house causes the second house to fall, and the third house afterwards fall in consequence of the loss of support which it had received from the second house, there will be no right of action by the proprietor of No. 3 against the proprietor of No. 1, and no such right will be acquired under the Prescription Act (a).

Prescrip-  
tive right  
to support.

But the owner of one house may acquire a right to support from his neighbour's after a lapse of twenty years from the erection of the house, as in that case a grant by the owner of the adjoining or subjacent lands to such right of support might be inferred (b). In the case of *Browne v. Robins* (c), it was clearly decided that where a coal mine is, as was the fact in that case, worked under another person's property, although not immediately adjoining, that if any damage ensues, such as the soil intervening giving way, the workers of the mine will be liable, and the court in that case seemed to lean to the opinion that if the house had been standing twenty years there was a right to the support of the surrounding ground for the maintenance of such house (d). Such right of support of the owner of an ancient house was discussed in the case of *Hunt v. Peake*, in which Vice-Chancellor Wood is reported to have said, "I do not know that it has come clearly, pointedly, and precisely in question in the former authorities. No doubt the dicta in *Bonomi v. Backhouse*, and *Humphries v. Brogden*, are clear to the effect that you acquire by a twenty years' acquiescence on the part of your neighbour a right to the easement, or whatever it is termed, of having the house you have added to your own soil supported by your neighbour's soil; but

*Browne v.*  
*Robins.*

*Hunt v.*  
*Peake.*

*Bonomi v.*  
*Backhouse.*

*Humphries*  
*v. Brogden*

(z) 30 L.J. Ex. 102.

(a) *Solomon v. Vintners Co.*, 28 L.J. Ex. 370.

(b) *Stansell v. Jollard*; *Hide v. Thornborough*; *Dodd v. Holme*; *Par-*

*tridge v. Scott*; *Rogers v. Taylor*, ante, pp. 458, 466.

(c) 28 L.J. Ex. 250; see also *Bibby v. Carter*, 28 L.J. Ex. 182.

(d) Ante, pp. 457, 468.

that doctrine has been called in question" (e). It was questioned in the case of *Solomon v. the Vintners' Company*, before referred to, but that case was not quite of the same character as the case of *Hunt v. Peake*, being the case of a house which leaned upon another, and we are not therefore surprised to find Chief Baron Pollock asserting that, "If the house removed had been the next adjoining the plaintiff's, we should have been much embarrassed by some cases and dicta," and "it seems to us that in the absence of all evidence as to the origin or grant, the only way in which such a right can be supported is that suggested by Lord Campbell in *Humphries v. Brogden*, viz. an absolute rule of law similar to that which is stated to have existed in the civil law, but there is no authority for any such rule, at least none is brought before us" (f). The three cases of *Humphries v. Brogden*, *Solomon v. Vintners' Company*, and *Hunt v. Peake*, were all decided upon different facts, and neither of them interferes with the judgment in the other. The result of the decisions would seem to be in favour of buildings existing twenty years, being entitled to the support of the soil; and in all other cases when a house falls in consequence of the subsidence of the soil caused by mining or other operations, the question of a right to support, will depend upon many surrounding circumstances; such as, the state or condition of the building, the distance from the excavations, the circumstances under which the house was built, and whether the house was built under a grant from the proprietor of the soil.

*Solomon v. Vintners' Co.*

Decisions in favour of a house standing 20 years.

By deed, lands were conveyed by A. to B., with a reservation to A. of the minerals and a right to work them, upon paying compensation to B. for any injury which might be done to the land by the working of the mines. Buildings were not mentioned in the deed in such a manner as to show clearly that they might be built upon the land, but the court thought, from a consideration of all the clauses in the deed, that the deed contemplated the erection of

Constructive support.

(e) 29 L.J. Ch. 785.

(f) 28 L.J. Ex. 376.



buildings, and upon that supposition decided that B. was entitled to compensation both in respect of the buildings and of the lands which were damaged (e).

#### SUPPORT TO RAILWAYS, PUBLIC WORKS AND CANALS.

*Works of a public company constructed under an Act of Parliament are entitled to less subjacent but to more adjoining and adjacent support than the works of a private owner. Wyrley Canal Company v. Bradley. Dudley Canal Company v. Grazebrook—Rex v. Leeds and Selby Railway Company. Caledonian Railway Company v. Sprot. North-Eastern Railway Company v. Crossland. Elliott v. North-Eastern Railway Company—Subjacent adjoining and adjacent support—a compulsory purchase, differs only from an ordinary purchase when the deed of conveyance or Act of Parliament imposes conditions. Fletcher v. Great-Western Railway Company; London & North-Western Railway Company v. Ackroyd not impugned by the judgment in Elliot v. North-Eastern Railway Company. Damages from subsidence, Croft v. London & North-Western Railway Company.*

Support to  
works of  
public  
companies.

THE right of support which a railway or other public company constructed under an Act of Parliament is entitled to receive from the subjacent and surrounding soil and minerals is not co-extensive, so far as relates to subjacent support, with the rights of private owners; but, as respects adjoining and to a greater degree adjacent support, the right is more extensive.

Wyrley  
Canal Co.  
v. Bradley.

In the case of the Wyrley Canal Company v. Bradley, the court were of opinion that the meaning of the Act of Parliament in requiring the coal-owners to give notice to the company of their intention to work their mines within a certain distance of the canal, was for the purpose of enabling the company to purchase the rights of the coal-owners, if they thought their canal works likely to be endangered by the nearer approach of the miners; but if the company declined the purchase, as they had done in this case, the court held, that the coal-owners were left to their common law rights, as if no canal had been made, and they might take every part of their coal in the same manner as they might have done before the Act passed,—their former rights in that respect not having been taken away by the Act, which had only appropriated the surface

of the land and so much of the soil as was necessary for the cutting and making of the canal (*h*).

In the case of the Dudley Navigation Company *v.* Grazebrook (*i*), land was taken by a canal company under an Act of Parliament, for the express purpose of using the same for the canal, but the mines and minerals were to remain the property of the vendor of the land, the company having power to purchase them. The company refused to purchase the mines, and the owner thereupon proceeded to work them in the usual and proper manner, and thereby injured the canal and works of the company; but it was held, in accordance with the before-mentioned case of Wyrley Canal Company *v.* Bradley, that the company had no remedy, and that the mine-owner was not liable to compensate the company for the injury they had sustained. In the course of argument Mr. Justice Littledale, a judge peculiarly conversant with the rights of mineral owners, made an observation which shows that he interpreted the law differently from that since laid down in *Harris v. Ryding* and other cases before mentioned (*j*). He said: "Suppose there had been no Act of Parliament in this case, and a man had sold the land to the company, reserving all mines to himself, he surely would have been entitled to work the mines in the usual way, even if he had thereby caused damage to the company." In the case of *Rex v. the Leeds and Selby Railway Company* (*k*), where a conveyance was made under a railway Act, excepting the minerals, the mine-owner was held to be under no obligation to leave a support for the surface.

But, in the cases of the Caledonian Railway Company *v.* Sprot (*l*) and the same Company *v.* Lord Belhaven (*m*) it was held, that if an owner of land convey lands for the purpose of a railway, but not under the provisions of an Act of Parliament, reserving the minerals with power to win and work the same, such reservation is subject to an implied condition that such support be left for the surface as was necessary for the land in its condition at the time of

Dudley  
Canal Co.  
*v.* Graze-  
brook.

*Rex v.*  
Leeds and  
South.  
Rail. Co.

Caledonian  
Rail. Co.  
*v.* Sprot.

(*h*) 7 East, 371.

(*i*) 1 Barn Ad. 59.

(*j*) Ante, p. 459.

(*k*) 3 Adol. and Ell. 688; and see

*Fenton, v. the Trent and Mersey Navigation Company*, 2 Rail. Cases, 837.

(*l*) 2 Macq. 449.

(*m*) 3 Jur. N.S. 578.

the grant, or the state, for the purpose of putting it into which, the grant was made. The former of these two cases was cited in *Fletcher v. Great Western Railway Company* (*n*), and the only answer given to it was that the conveyance containing the reservation in question, was not made pursuant to an Act of Parliament.

North-  
Eastern  
Rail. Co.  
*v.* Cross-  
land.

In *North-Eastern Railway Company v. Crossland* it was held, that a vendor selling land to a railway company, for the purposes of a railway, even though the sale was compulsory, and the minerals were reserved, is bound to leave sufficient support for the railway and works, both vertical and lateral; and in that case, although minerals of great value were known to be under the railway, the owner of the minerals was not allowed to search for them, because by so doing the railway and works would be damaged (*o*).

*Elliott v.*  
North-  
Eastern  
Rail. Co.

The case of *Elliot v. the North-Eastern Railway Company*, which has been for some time before the court, has at length been decided in the House of Lords. In that case a conveyance of a strip of land was made to a railway company in 1834, under an Act of Parliament, which provided, by one section, that all coal or other mineral should be deemed to be excepted out of any purchase of lands by the company, and might be worked by the owners and lessees thereof, "so that no damage or obstruction be done or thereby occur to or in such railway or other works;" and in case of damage reparation was to be made by the owners or lessees; by another section, whenever the workings should approach within twenty yards of any masonry or building belonging to the company, notice thereof was to be given to the company, and they might then require the minerals under such masonry or building to be reserved for their protection, in which case they were to purchase the same; but if the company did not require the minerals to be left, the owners or lessees might work the minerals under the said masonry or buildings, in the usual and ordinary manner of working mines, doing no avoidable da-

(*n*) 28 L.J. Ex. 147; 29 L.J. Ex. 253.      (*o*) 2 Jo. & H. 565.



mage. The land was taken for the purpose of building thereon a bridge of great weight, which was subsequently built by the company. At the time of the purchase there was beneath the land, and a large tract of adjoining land belonging to the vendor, an old mine, which had been accidentally flooded, and had long previously been full of water. In 1859 a lessee, deriving title under the vendor, threatened to drain the mine and renew the workings: and it was held, that, in addition to the right of surface and lateral support, and the special protection afforded by the Act in respect of workings within twenty yards distance of any masonry or building, the railway company was entitled, by way of necessary incident to the grant of the land, to such lateral support from the adjacent land of the vendor not situate within the twenty yards as might be necessary to uphold the bridge; and that the lessee was properly restrained from working minerals under the adjacent land not the property of the company, and not within the limits of twenty yards, so as to affect the stability of the bridge. It was further held, that the circumstance of the conveyance of the land being compulsory and not voluntary could not, in the absence of any special enactment, affect the construction of the conveyance, nor prevent it from passing to the company the necessary right of support as an ordinary legal incident to the purchase. The judgment in the case merits attention. Lord Chelmsford said: "The Act of the company provided for the rights of the mine-owner and of the company as far as the purchased lands extend. But the injunction which has been granted restrains the appellant from working, not only under the purchased lands, but also under or in the land adjoining to the land so purchased, in such a manner as to affect the stability of the Victoria Bridge, the railway, and other works. And the appellant contends that the company having secured by their Act a certain amount of support to their masonry and buildings, and also within the limits of the purchased lands what may be necessary for the ordinary purposes of the railway, their rights are defined by the Act, and the rule of the common law with

Lateral  
support.

regard to lateral support from adjacent land is altogether excluded. But this argument appears to me to be answered by the decision of this House in the case of the Caledonian Railway Company *v.* Sprot (*p*). There the Act contained a clause making it competent to the proprietor whose lands were authorized to be taken, to reserve from the bargain and sale to the company the whole minerals in the lands for his own proper use and behoof, but restraining him from working the minerals till he had given security from injury which might thence in any way result to the undertaking. The conveyance of Mr. Sprot to the company contained a reservation of the minerals under the land conveyed, and may be considered as equivalent to the exception of the minerals by the Act itself. And Lord Cranworth, then Lord Chancellor, in advising the House, said, 'Independently of any parliamentary enactment, the effect of the conveyance was to convey the land to be covered by the railway to the company, together with a right to all reasonable subjacent and adjacent support, a right to such support being a right necessarily connected with the subject-matter of the grant.' Lord Kingsdown, in his judgment, said, "The question then is, what are the rights the company would have acquired against the vendor by the conveyance from him if the purchase had been made by private bargain, and the conveyance had reserved to the vendor the right to the minerals under the land sold? I apprehend that upon the authorities there can be no doubt that the vendor having sold the land for the bridge and the railway, could not so use the property which he had reserved, either the minerals under the land sold, or the surface of or minerals under the adjoining land, as to prejudice the use of that which he had granted for the purpose for which it was known to have been granted. He could not have taken away either from under the land sold or from the adjoining land, minerals, the abstraction of which would have the effect of interrupting the railway, or endangering the bridge. That this would be so at common law in the case of a private

Subjacent  
and ad-  
joining  
support.

contract was not disputed, but it is said the law is different when a compulsory sale is made under an Act of Parliament; in which case it was argued that the purchaser takes nothing but what the Act of Parliament gives in terms. It is extremely difficult to understand what difference there can be for this purpose between the effect of a conveyance when the contract is entered into under the authority of an Act of Parliament and when it is made by private bargain. In either case the conveyance must pass the property described in the deed with its legal incidents. There may, indeed, be either in the conveyance or in the Act of Parliament, provisions which exclude from the conveyance of the land its ordinary legal incidents, but unless something to this effect be shown, the ordinary legal incidents will attach to the land. The real question, therefore, is, does the conveyance in this case, or does the Act under which it was made, contain anything which excludes the operation of the ordinary rule of law? The appellant represents the vendor, and can assert no rights which the vendor could not have maintained. It is not suggested that there is anything special in the terms of the conveyance, but the provisions of the Act of Parliament are relied on. Let the matter be considered first under the 27th section. That section applies only to minerals reserved, that is, to minerals under the sold land, and so far from containing anything contrary to the common law right, it expressly recognizes and enforces it, for it provides that the minerals may be got by the owner, so that no damage or obstruction be thereby caused to the railway or works; and that if any damage be done and the owner do not repair it, the company may do it and charge the expense on the owner. Does this recognition of the common law right to subjacent support afford any inference of an intention to exclude the common law right to lateral support? I can see no foundation for any such inference. But this question seems to me to be settled by the decision of your lordships in *Sprot's case* (q). There can be no doubt that the operation of this clause will extend to the bridge as well as to the other works

Compulsory sale when and how different to a voluntary one.



Adjacent  
support.

of the railway, unless by the effect of the 28th section the bridge is excluded from the protection which is afforded to other portions of the railway not consisting of masonry or buildings. The 28th section, like the 27th, is confined to minerals worked under the sold lands, and it has nothing to do with lateral support; I mean, with support to be afforded to the land sold, by the adjoining land. Section 28 seems to me intended to give an additional protection in certain cases to the railway company. The personal remedy against the miner given by the former clause, would often be very insufficient where buildings, possibly of great value, like the bridge in this case, might be destroyed by working. The person guilty of the destruction might, very probably, be quite unable to answer any damages for the injury which he had caused, and the injury might, in many cases, be of a character for which pecuniary damages would afford no adequate compensation; therefore, when the workings approached within such a distance of buildings as, in the opinion of the Legislature, was likely to endanger them, it gave the railway company the right of purchasing the minerals either immediately under the buildings or within twenty yards of them. Which is the true construction is, for the present purpose, immaterial. The owner being compelled to sell at a price, nothing could be more reasonable than that if the railway company refuse to purchase, the owner should be at liberty to get the minerals in a workmanlike manner; and that, if he did no damage to the railway beyond that which was unavoidable, he should be relieved from all responsibility. When the absolute right to the minerals was reserved to the owner, he was to work at his own peril. When his right was qualified by the option given to the company to purchase, then, if the company preferred the risk of damage to the expense of purchase, they were to be subjected to the risk which they refused to buy off. There is nothing, as it seems to me, but what is just and reasonable in these provisions, which are in no degree inconsistent with each other. The result is, that in this Act of Parliament there is nothing, in my opinion, to exclude the ordinary right of a purchaser to

such support of the land which he has bought, both subjacent and adjacent, as the common law of the land gives him."

The result of these decisions, by no means clear or satisfactory, seems to leave the law in the same state as it was laid down in the case of *Fletcher v. Great Western Railway Company* (*r*); there it was decided that the railway company was not entitled to support from minerals underneath the land purchased. In the case of the *London and North-Western Railway Company v. Ackroyd* (*s*), a distinction is drawn between a right of support from the *earth* and the minerals underneath, and in that case it was held with some reason, that although the railway could not require the minerals to be left as a support, they were entitled to the earth. The case of *Elliot and North-Eastern Railway*, does not interfere with either of the above-mentioned decisions. That case was decided upon the construction of special clauses in the Special Act of the company; nevertheless, the decision establishes a right of every railway company to the support of the adjoining and adjacent soil in a much more extensive form than had previously been supposed, or than can be claimed by private owners; and for this reason, when lands are sold to a railway company, it is known that works of a very ponderous description may be erected thereon, which will require not only the support of the lands immediately adjoining, but of those at some distance from the railway works.

We have already referred to a recent case which has decided that no damages for subsidence of the soil can be recovered when such subsidence might have been foreseen. In fact, a railway company is not to be called upon for damages for any injury to the surrounding property which could reasonably have been anticipated from the nature of the works. Compensation in such cases must be claimed in the first instance (*t*).

(*r*) Ante, pp. 200, 465, 478.  
(*s*) 81 L.J. Ch. 588.

(*t*) Ante, pp. 203, 472.

*Fletcher v.*  
*Great*  
*Western*  
*Rail. Co.*

*London and*  
*North*  
*Western*  
*Rail. Co. v.*  
*Ackroyd.*

Unforeseen  
damages  
from sub-  
sidence.

## SECTION III.

## STREAMS AND WATER-COURSES.

**NATURAL STREAMS AND WATER-COURSES.** *When water is part of the Freehold or only an Easement—The Roman Law—French and American Law—recognized in England—right to water flowing in its natural state—prescriptive right—remedies—25 & 26 Vic. c. 67 not to affect any claim or right to water.*

**DIVERSION AND DEFILEMENT OF WATER.** *To what extent and for what purposes water may be diverted—prescriptive right—Defilement of water whilst carrying on mining operations—Water-works Act, 1847—Salmon Fisheries Acts, 1861, 1862—Scotland.*

**SUBTERRANEAN AND SPRING WATER.** *Distinction between water flowing on the surface and underground water—springs—the Roman Law referred to—reasonable use of the water. No prescriptive right—Code Napoleon—American Law.*

**ARTIFICIAL WATER AND WATER-COURSES.** *Distinction between artificial and natural Water-courses—prescriptive rights—American Law.*

NATURAL  
WATERS.

As forming the subject of ownership, in connexion with the realty, water may be viewed under two aspects,—first, as constituting one of the natural elements of which an estate is composed, and giving, by its qualities and susceptibilities of use, a natural value to such estate; secondly, as a right only attached to such estate to be enjoyed in connexion with the occupation of the soil, and consequently valuable only for its use. In the former sense, the stream of water, but not the water itself, is part of the freehold, which the proprietor of the soil is entitled to, *ex jure naturæ*; in the latter, it constitutes an incorporeal hereditament to which the term *easement* is applied.

When  
water is  
part of the  
freehold,  
or only an  
easement.

The Roman law is as follows: “*Et quidem naturali jure, communia sunt omnium hæc: ær, aqua profluens, et mare, et per hoc littora maris*” (a). It is worthy of remark, that in *Fleta*, where the “*res communes*” are enumerated, no

(a) Inst. lib. ii. tit. i. s. 1.



mention is made of “*aqua profluens*” (*b*). *Vinnius*, in <sup>Roman</sup> his commentary on the Institutions, explains the mean-<sup>law.</sup>ing of the text; as follows: “*Communia sunt quæ à natura ad omnium usum prodita, in nullius adhuc ditionem aut dominium pervenerunt: Huc pertinent, præcipue aër et mare, quæ cum propter immensitatem, tum propter usum, quem in commune omnibus debent, jure gentium divisa non sunt, sed relictæ in suo jure, et esse primævo adeoque nec dividi potuerunt. Item aqua profluens, hoc est, aqua jugis, quæ vel ab imbribus collecta, vel è venis terræ scaturiens perpetuum fluxum agit, flumenque aut rivum perennem facit. Postremò propter mare, etiam littora maris. In hisce rebus duo sunt, quæ jure naturali omnibus competunt. Primum communis omnium est harum rerum usus, ad quem natura comparatæ sunt: tum siquid earum rerum per naturam occupari potest, id eatenus occupantis fit, quatenus ea occupatione usus ille promiscuus non læditur*” (*c*). And he proceeds to describe the use of water, “*aqua profluens ad lavandum et potandum unicuique jure naturali concessa.*” The law as to rivers, is “*flumina autem omnia, et portus, publica sunt; ideoque jus piscandi omnibus commune est in portu fluminibusque.*” And *Vinnius*, in his commentary on this passage says, “*Unicuique licet in flumine publico navigare et piscari*” (*d*). And he proceeds to distinguish between a river and its water: the former being, as it were, a perpetual body, and under the dominion of those in whose territories it is contained; the latter being continually changing, and incapable, whilst it is there, of becoming the subject of property, like the air and sea. In public rivers, whether navigable or not, it appears that every one was forbidden to lower the water or narrow the course of the stream, or in any way to alter it, to the prejudice of those who dwelt near, and there is a distinction made between public and private rivers. From these authorities it seems that the Roman law considered running water, not as a *bonum vacans*, in which any one might acquire a property; but as public or common in this sense

(*b*) Lib. iii. ch. i.(*c*) Lib. ii. tit. i. p. 124.(*d*) Lib. ii. tit. i. p. 127.

only, that all might drink it, or apply it to the necessary purposes of supporting life ; and that no one had any property in the water itself except in that particular portion which he might have abstracted from the stream, and of which he had the possession, and during the time of such possession only (c).

American  
law.

The law in America as to the right of a land proprietor to a natural water-course flowing through his land, appears to embody the Roman law upon that subject, and it is thus stated by Chief Justice Story (d): "Every person through whose land a natural water-course runs, has a right, *publici juris*, to the benefit of it as it passes through his land, to all the useful purposes to which it may be applied; and no proprietor of land on the same water-course, either above or below, has a right unreasonably, to divert it from flowing into his premises, or obstruct it in passing from them, or to corrupt or destroy it. It is inseparably annexed to the soil, and passes with it, not as an easement, nor as an appurtenance, but as parcel. Use does not create it, and disuse cannot destroy or suspend it. Unity of possession and title in such land with the lands above it or below it does not extinguish it or suspend it." And Justice Story further expounds the law of natural rights by stating that, "*Primâ facie*, every proprietor upon each bank of a river is entitled to the land covered with water in front of his bank, to the middle thread of the stream. In virtue of this ownership, he has a right to the use of the water flowing over it in its natural current without diminution or obstruction. But strictly speaking, he has no property in the water itself, but the simple use of it while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of the river, the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to the proprietor below,

Natural  
rights.

(c) Digest, lib. xliii. tit. xii. xiii.; (d) Johnson v. Jordan, 2 Mete. Embrey v. Owen, 6 Ex. 368. (U.S.), 234.

or to throw it back upon a proprietor above. This is the necessary result from the perfect equality of right among all the proprietors of that which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by the operation of law, to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no obstruction or impediment whatever, by the riparian proprietor, in the use of the water as it flows, for that would be to deny any valuable use of it. There may be, and there must be, allowed of that which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. The maxim is applied, *Sic utere tuo ut alienum non lædas*" (e).

Lord Denman in delivering judgment in the case of *Mason v. Hill*, adopted the Roman law as well as the American, and after referring to the opinion of Blackstone (who lays it down that water is a moveable, wandering thing, and must of necessity continue common by the law of nature, so that no one can have more than a temporary, transient, usufructuary, property therein), his lordship said: "That there is no authority in our law, nor, as far as we know, in the Roman law, that the first occupant has any right, by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein" (f).

Mr. Baron Parke, in delivering judgment in the case of *Embrey v. Owen*, is reported to have said: "The law

The Roman and American law recognized.

(e) *Tyler v. Wilkinson*, 4 Mason, 397, and other American authorities, viz. 3 Kent's Comm. 439; *Gardner v. Trustees of Village of Newburgh*, 2 Johns.(Ch.K.), 162; *Soc. for Establishing Manufactures v. Morris Canal and Banking Co.* Saxt. Ch. 157, 188; *Merritt v. Parker*, Cox, 460; *Shreve v. Voorhees*, 2 Green, ch. 25; *Cary v. Daniels*, 8 Metc. 466; *Haas v. Chousard*, 17 Lexis, 588; *Hendrick v. Cook*, 4 Ga. 241, 255; *Dilling v. Murray*, 6 Ind. 324; *Evans v. Merriweather*,

3 Scamm. 492; *Tourtellot v. Phelps*, 4 Gray, 370; *Gould v. Boston Duck Co.* 13 Gray, 442; *Twiss v. Baldwin*, 9 Com. 291; *Platt v. Johnson*, 15 Johns. 213; *Howell v. McCoy*, 3 Rawle, 256; *Blanchard v. Baker*, 8 Me. 253; *Bardwell v. Ames*, 22 Pick. 354.

(f) *Mason v. Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1; see also *Dickinson v. Grand J. Canal Co.* 7 Ex. 300; *Wood v. Waud*, 3 Ex. 748, 775; post. pp. 501, 505.



Embrey  
v. Owen.

Right to  
flowing  
water.

American  
law  
quoted.

Diverting  
or dimi-  
nishing  
water.

as to flowing water is now put on its right footing by a series of cases, beginning with that of *Wright v. Howard* (*g*), followed by *Mason v. Hill* (*h*), and ending with that of *Wood v. Waud* (*i*), and is fully settled in the American courts (*j*). The right to the benefit and advantage of the water flowing past land, is not an absolute and exclusive right to the flow of all the water in its natural state; if it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie; for such an use an action will lie even though there may be no actual damage done. In the part of 'Kent's Commentaries' to which we have referred, the law on this subject is most perspicuously stated, and it will be of advantage to cite it at length: 'Every proprietor of land on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. "*Aqua currit et debet currere*" is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant,

(*g*) 1 Sim. & S. 190.

(*h*) Ante, p. 487.

(*i*) 3 Exch. 748.

(*j*) See 3 Kent's Comm. Lec. 52, pp. 439-445; and ante, p. 486.

or an uninterrupted enjoyment of twenty years, which is evidence of it (*k*). This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water; nor can he, by dams, or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbour above him. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream. He must not shut the gates of his dams and detain the water unreasonably, nor let it off in unusual quantities, to the annoyance of his neighbour. Pothier lays down the rule very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise, rivers

Prescriptive right.

(*k*) Ante, pp. 327, 446; post, pp. 491, 494, 501, 503; *Deeble v. Linehan*, 12 Ir. C.L. 1.

and streams of water would become utterly useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law: *Sic enim debere quem meliorem agrum suum facere, ne vicini deteriore faciat.*' In America, as may be inferred from this extract, and as is stated in the judgment of the Court of Exchequer in *Wood v. Waud* (*l*), a very liberal use of the stream for the purposes of irrigation and for carrying on manufactures is permitted. So in France, where every one may use it '*en bon père de famille, et pour son plus grand avantage*' (*m*). He may make trenches to conduct the water to irrigate his land, if he returns it with no other loss than that which irrigation caused. In the above-cited case of *Wood v. Waud*, it was observed, that in England it is not clear that a user to that extent would be permitted; nor do we mean to assert that it would in every case be deemed a lawful enjoyment of the water, if it was again returned into the river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend upon the circumstances of each case. On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream, in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in de-

French  
law.

Wood &  
Waud.

(*l*) 3 Ex. 748.

(*m*) Code Civil, art. 640; Manuel

de Droit Français, par Pailliet, Paris,

1837.



ciding whether a particular case falls within the permitted limits or not; and in this we think, that as the irrigation took place, not continuously, but only at intermittent periods, when the river was full, and no damage was done thereby to the working of the mill, and the diminution of the water was not perceptible to the eye, it was such a reasonable use of the water as not to be prohibited by law. If so, it was no infringement of the plaintiff's right at all; it was only the exercise of an equal right which the defendant had to the usufruct of the stream." The case of *Embrey v. Owen* was confirmed in the cases of *Dickinson v. Grand Junction Canal* (*n*), *Sampson v. Hoddinott* (*o*), *Dudden v. Guardians of the Clutton Union* (*p*); and in the case of *Chasemore v. Richards* (*q*), Lord Wensleydale said: "The subject of the right to streams of water flowing on the surface had of late years been fully discussed and placed on a clear and satisfactory ground. It was now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturæ*, belonged to the proprietor of the adjoining lands, and that he was entitled to the benefit of it, as of all other natural advantages incident to the land of which he was the owner. He had the right to have it come to him in its natural state in flow, quantity, and quality, and to go from him without obstruction, and this right did not depend upon prescription." *Chasemore v. Richards* was acted upon in the recent case of *Reg. v. Metropolitan Board of Works* (*r*); and the law has since undergone no alteration (*s*).

A prescriptive right to water may be acquired, but water which squanders itself over an indefinite surface is not a proper subject for acquisition by user (*t*).

From the authorities quoted it appears that if the upper proprietor of land, by a particular system of drainage, or any unusual use of the water, prevents the natural flow of

(*n*) 7 Ex. 299; 15 Beav. 260.

(*o*) 26 L.J. C.P. 148.

(*p*) 26 L.J. Ex. 146.

(*q*) 29 L.J. Ex. 81; s.c. 7 H.L. Cases, 349.

(*r*) 32 L.J. Q.B. 105.

(*s*) *Elwell v. Crowther*, 31 L.J. Ch. 763; *Hodgkinson v. Ennor*, 32 L.J. Q.B. 281.

(*t*) *Briscoe v. Drought*, 11 Ir. C.L. 250; ante, p. 327, 489; post, 494, 501, 503.

Remedies. the water from coming on his neighbour's land, whereby he sustains injury, he will be liable to an action; and the courts will also interfere, by way of injunction, when irreparable damage is anticipated (*u*); nevertheless, any landowner may appropriate as much of the water as he pleases for the proper cultivation of the land, or by digging a well (*v*), and generally for mining purposes, notwithstanding the effect may be to deprive his neighbour of the water, or to cause the water to flow into his neighbour's mine (*w*).

25 & 26 Vic. c. 67. A declaration of title under the 25 & 26 Vic. c. 67, s. 29, is not to affect any claim or right to water-courses, or rights of water.

DIVERSION OF WATER. The law of England upon the subject of diverting water is much more stringent than the law on the Continent or in America, arising, no doubt, from the fact that the quantity of water which flows from the streams in our own country is much less, and consequently more valuable. Mr. Baron Parke, in the case of *Embrey v. Owen*, already referred to (*x*), intimates that it would be impossible to draw precise limits as to what would be a reasonable or wrongful use or diversion of the water, and that each case must depend upon circumstances. The same view was taken by the court of Pennsylvania, and the reasonableness of the detention of water was there left to the jury. The judge declared that the law required that the stream should be used in a reasonable manner, and that one of the conditions of the use was "that he did not destroy or render useless or materially lessen or affect the application of the water by those situated above or below him in the stream" (*y*). The law was ably laid down by the Chief Justice in America, in the case of *Elliott v. Fitchburg Railway Company* (*z*). To take a quantity of water, says

(*u*) *Haward v. Bankes*, 2 Burr. 1113; *Smith v. Kenrick*, 7 C.B. 515; *Elwell v. Crowther*, 31 L.J. Ch. 762; *Ennor v. Barwell*, 2 Giff. 410; *Hodgkinson v. Ennor*, 32 L.J. Q.B. 231.

(*v*) *Chasemore v. Richards*, 7 H.L. Ca. 349; *New River Co. v. Johnson*, 6 Jur. N.S. 374.

(*w*) *Acton v. Blundell*, post, p. 496; *Galgay v. G. S. & W. Rail.* 4 Ir. C.L. 456; *Insole v. James*, 1 H. & N. 243;

*Ennor v. Barwell*, supra; *Williamson v. Baird*, 10 Jur. N.S. 154.

(*x*) 6 Ex. 353; ante, p. 488; *Whaley v. Laing*, 2 H. & N. 476; *Rawstron v. Taylor*, 25 L.J. Ex. 33; *Broadbent v. Ramsbotham*, 25 L.J. Ex. 115.

(*y*) *Miller v. Miller*, 9 Penn. St. Rep. 74.

(*z*) 10 Cush. (U.S.), 191.

the learned judge, from “a large running stream for agriculture or manufacturing purposes would cause no sensible or practical diminution of the benefit to the prejudice of a lower proprietor, whereas taking the same quantity from a small running brook, passing through many farms, would be of great and manifest injury to those below who need it for domestic supply, or watering cattle, and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is, therefore, to a considerable extent, a question of degree. Still the rule is the same, that each proprietor has a right to a reasonable use of it for his own benefit, for domestic use and for manufacturing and agricultural purposes. It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation; but this, we think, is an abstract question, which cannot be answered either in the affirmative or negative, as a rule applicable to all cases. That a portion of the water of a stream may be used for the purposes of *irrigating* land we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot, under colour of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the water-course, or take such unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefit which they might derive from it if not diverted or used unreasonably. . . . The right to the use of flowing water is *publici juris*, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land, so that any obstruction would give a cause of action, but it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an obstruction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie. But for such deprivation or unwarrantable use an action will lie, though there be no actual present

Diversion  
of water.

Rights of  
irrigation.

Remedies.



damage." By reason of possession of an estate there is a right to the use of a stream of water for the purposes of irrigation for a certain limited period, and if an action be brought for diverting the water, the right may be averred in the declaration as an easement to which the plaintiff is entitled by reason of his possession, without mentioning or referring to the title-deeds under which the plaintiff acquired the right (*a*).

Prescriptive right.

A prescriptive title to divert water for any purpose may be acquired (*b*); this has been clearly laid down in America as well as in England (*c*), but the privilege claimed must not go to the destruction of the subject-matter, otherwise it will be unreasonable, and therefore bad (*d*).

FOULING  
WATER BY  
MINING.

Primâ facie no one has a right to defile water, and there is no distinction in this respect between water which flows in an open water-course and water which percolates through the soil (*e*). But a prescriptive right may even be acquired to foul or corrupt the waters of a pond or stream for the purposes of trade, or in the working for ores or minerals (*f*); nevertheless such a prescriptive right must have been continuous, and it is doubtful whether the exercise of the right can be less than once at least in each year if a title by prescription is relied upon (*g*).

In the case of *Weeks v. Heward*, where the plaintiff filed a bill and prayed for an injunction to restrain the defendant from polluting a stream which supplied certain watercress beds of the plaintiffs, the injunction was refused, on the ground, it seems, that the defendant's right to use the water was, in the absence of any prescriptive

(*a*) *Mortham v. Hurley*, 1 Ell. & B. 665.

(*b*) *Embrey v. Owen*; ante, pp. 327, 489; post, pp. 501, 503.

(*c*) *Arnold v. Foot*, 12 Wend. (U.S.), 330; *Bealey v. Shaw*, 6 East, 208; *Wright v. Williams*, 1 M. & W. 77; *Arkwright v. Gell*, 5 M. & W. 203; *Greatrex v. Hayward*, 8 Ex. 291; *Magor v. Chadwick*, 11 Ad. & Ell. 571; *Murgatroyd v. Robinson*, 26 L.J. Q.B. 233; *Moore v. Webb*, 1 C.B. N.S. 673; *Sutcliffe v. Booth*, 32 L.J. Q.B. 136.

(*d*) *Arkwright v. Gell*, 5 M. & W. 203; *Taylor v. Bennett*, 7 Car. & P. 329; *Carlyon v. Lovering*, 26 L.J. Ex. 251.

(*e*) *Hodgkinson v. Ennor*, 32 L.J. Q.B. 231.

(*f*) *Wright v. Williams*, 1 M. & W. 77; *Wood v. Sutcliffe*, 2 Sim. N.S. 163; *Ward v. Robins*, 15 M. & W. 237; *Carlyon v. Lovering*, 1 H. & N. 784; *Stockport Water Co. v. Potter*, 7 Jur. N.S. 880.

(*g*) *Arkwright v. Gell*, 5 M. & W. 203; *Lowe v. Carpenter*, 6 Ex. 825.

right, as good as the plaintiff's ; but the right of a riparian proprietor to receive the water unpolluted does not seem to have been disturbed by the decision (*h*).

The fouling of water is prohibited by the 10 Vic. c. 17, s. 61, and applies to every person who shall bathe in any stream, reservoir, aqueduct, or other waterworks belonging to the undertakers, or wash, throw, or cause to enter therein any dog or other animal : also every person who shall throw any rubbish, dirt, filth, or other noisome thing into any such stream, reservoir, aqueduct, or other waterworks as aforesaid, or wash or cleanse therein any cloth, wool, leather, or skin of any animal, or any clothes, or other thing ; and also to every person who shall cause the water of any sink, sewer, or drain, *steam-engine, boiler, or other filthy water* belonging to him or under his control, to run or be brought into any stream, reservoir, aqueduct, or other waterworks belonging to the undertakers, or shall do any other act whereby the water of the undertakers shall be fouled. Water-works  
Clauses  
Act, 1847.

By the 24 & 25 Vic. c. 109, being the Salmon Fishery Act, 1861, all persons are forbidden under the penalties of the Act from putting, or knowingly permitting to be put, into any water containing salmon, or into any tributaries thereof, any liquid or solid matter to such an extent as to cause the waters to poison or kill the fish ; but no person is to be subject to the penalties of the Act for anything done in the exercise of any right to which he is by law entitled, if he prove to the satisfaction of the court before whom he is tried that he has used the best practicable means, within a reasonable cost, to render harmless the liquid or solid matter so permitted to flow or to be put into waters ; and nothing in the Act is to prevent any person from acquiring a legal right in cases where he would have acquired it if the Act had not been passed, or to exempt any person from any punishment to which he would otherwise be subject, or legalize any act or default that would but for the Act be deemed to be a nuisance or otherwise contrary to law (*i*). Salmon  
Fishery  
Acts.

(*h*) 10 W. R. 557. (*i*) Secs. 5, 6, 7 ; *Hodgson v. Little*, 14 C.B. N.S. 111.

Scotland.

The above-mentioned Act only applies to England, but by the 25 and 26 Vic. c. 97, being the "Salmon Fisheries Scotland Act, 1862," there is a similar provision in reference to the salmon rivers of that country, with an exception, however, in respect of the river Tweed and to all the fisheries in that river, or the mouth or entrance thereof, as defined by the "Tweed Fisheries Amendment Act, 1859" (*j*).

SUBTER-  
RANEAN  
AND  
SPRING  
WATER.

The distinction between underground and percolating waters, and those which flow on the surface, was clearly laid down by Chief Justice Tindal in the case of *Acton v. Blundell* (*k*). In that case the plaintiff claimed a right to the water of certain *underground springs, streams, and water-courses*, which, as he alleged, ought of right to run, flow, and percolate, into his lands for supplying certain mills with water; and also for the draining off the water of a certain *spring or well of water* in certain land of the plaintiff, by reason of the possession of which land (as he also alleged) he ought of right to have the use, benefit, and enjoyment of the water of the said spring or well for the convenient use of his land. The defendants, by their pleas, traversed the plaintiff's alleged rights. At the trial, the plaintiff proved, that within twenty years before the commencement of the suit, viz. in the latter end of 1821, a former owner and occupier of certain land and a cotton-mill, had sunk and made in such land a well for raising water for the working of the mill; and that the defendants, in the year 1837, had sunk a coal-pit in the land of one of the defendants at about three-quarters of a mile from the plaintiff's well, and about three years after sunk a second at a somewhat less distance; the consequence of which sinkings was, that by the first, the supply of water was considerably diminished, and by the second was rendered altogether insufficient for the purposes of the mill. The learned judge, before whom the cause was tried, directed the jury that, if the defendants had proceeded and acted in the usual and proper manner on the land for the purpose of working and winning a

(*j*) See secs. 13, 34; also the Tweed Acts, 1857, 1859. (*k*) 12 M. & W. 347.



coal mine therein, they might lawfully do so, and that the plaintiff's evidence was not sufficient to support the allegations in his declaration. Against this direction of the judge the counsel for the plaintiff tendered a bill of exceptions.

Lord Denman in his judgment said: "The question argued before us has been in substance this, whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to, and regulates, a water-course flowing on the surface. The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established; each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases, for any purpose of his own, not inconsistent with a similar right in the proprietors of the land, above or below; so that, neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the license or the grant of the proprietor above. The law is laid down in those precise terms by the Court of King's Bench, in the case of *Mason v. Hill* (*l*), and substantially is declared by the Vice-Chancellor in the case of *Wright v. Howard* (*m*), and such we consider a correct exposition of the law. And if the right to the enjoyment of underground springs, or to a well supplied thereby, is to be governed by the same law, then undoubtedly the defendants could not justify the sinking of the coal-pits, and the direction given by the learned judge would be wrong. But we think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and

Distinction  
between  
water  
flowing on  
the surface  
and under-  
ground  
water.

Springs.

(*l*) 5 B. & Ad. 1; 2 Nev. & M. (m) 1 Sim. & S. 190; ante, p. 488.  
747; ante, p. 487.

Distinction  
between  
springs  
and water  
flowing on  
the sur-  
face.

substantial difference between the two cases, and that they are not to be governed by the same rule of law. The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long continued—in ordinary cases, indeed, time out of mind—and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law (which would seem to be the opinion of Fleta and of Blackstone), the origin of which is lost by the progress of time; or it may not be unfitly treated, as laid down by Mr. Justice Story, in his judgment in the case of *Tyler v. Wilkinson*, in the courts of the United States (*n*), as ‘an incident to the land; and that whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law.’ But in the case of a well sunk by the proprietor, in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface: no man can tell what changes these underground sources have undergone in the process of time: it may well be, that it is only yesterday’s date, that they first took the course and direction which enabled them to supply the well: again, no proprietor knows what portion of water is taken from beneath his own soil: how much he gives originally, or how much he transmits only, or how much he receives: on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well, there can be no ground for implying any mutual consent or agreement, for

(*n*) 4 Mason (U.S.), 401; ante, p. 486.

ages past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built; nor, for the same reason, can any trace of a positive law be inferred from long-continued acquiescence and submission, whilst the very existence of the underground springs or of the well may be unknown to the proprietors of the soil. But the difference between the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner of the soil merely transmits the water over its surface: he receives as much from his higher neighbour as he sends down to his neighbour below: he is neither better nor worse: the level or the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil; and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbours, he may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of *mining*, and discovers, when too late, that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment on the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking-place for cattle; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined: in the present case, the nearest coal-pit is at a distance of half a mile from the well: it is obvious the law must equally apply if there is an interval of many miles. Considering, therefore,

When interruption of right is unknown.

Mining not to be prejudiced.



the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar from those which exist in the other; and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith. No case has been cited on either side bearing directly on the subject in dispute. The case of *Cooper v. Barber (o)*, which approaches the nearest to it, seems to make against the proposition contended for by the plaintiff. In that case, the defendant had for many years penned back a stream for the purpose of irrigation, in consequence of which the water had percolated through a porous and gravelly soil into the plaintiff's land; but as this percolation had been insensible and unknown by the plaintiff until the land was applied for building purposes, the court held, that the defendant had gained no right thereby, so as to justify its continuance. The case of *Partridge v. Scott (p)*, is an authority to show that a man, by building a house on the extremity of his own land, does not thereby acquire any right of easement, for support or otherwise, over the adjoining land of his neighbour. It is said, in that case, 'he has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect.' It must follow, by parity of reason, that, if he digs a well in his own land so close to the soil of his neighbour, as to require the support of a rib of clay or of stone in his neighbour's land to retain the water in the well, no action would lay against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water; and it would seem to make no difference as to the legal rights of the parties, if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary; which is, in substance,

How far adjoining lands may be claimed to prevent water from flowing out.

the very case before us. The Roman law, forms no rule, Roman law. binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe. The authority of one at least of the learned Roman lawyers appears decisive upon the point in favour of the defendants; of some others the opinion is expressed with more obscurity. In the Digest, lib. xxxix. tit. iii., *De aquâ pluviâ arcendâ* (sec. 12), ‘*Denique Marcellus scribit, cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi: nec de dolo actionem; et sane non debet habere; si non animo vicini nocendi, sed suum agrum meliorem faciendi id fecit.*’ It is scarcely necessary to say, that we imitate no opinion whatever as to what might be the rule of law, if there had been an uninterrupted user of the right for more than the last twenty years; but, confining ourselves strictly to the facts stated in the bill of exceptions, we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it be solid rock, porous ground, or venous earth, or part soil and part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour’s well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action.” Prescriptive right.

The decision in *Acton v. Blundell*, was afterwards explained by Pollock, C.B. (q), as having only decided Dickinson v. Grand J. Canal Co.

(q) *Dickinson v. Grand Junction Canal Co.* 7 Ex. 282.

that the owner of a piece of land, who has made a well in it, and thereby enjoyed the benefit of underground water, but for less than twenty years, has no right against a neighbouring proprietor who, in sinking for and getting coals from his soil in the usual and proper manner, causes the well to become dry.

Race v.  
Ward.

In the case of *Race v. Ward*, Lord Campbell, C.J., in delivering judgment, said: "The water which they claim a right to take is not the produce of the plaintiff's close; it is not his property; it is not the subject of property. It is not disputed that this would be so with respect to the water of a river or any open running stream; we think it is equally true as to the water of a spring when it first issues from the ground. This is no part of the soil, like sand, or clay, or stones; nor the produce of the soil, like grass, or turfs, or trees. A right to take these by custom, claimed by all the inhabitants of a district, would clearly be bad; for they all come under the category of *profit à prendre*, being part of the soil, or the produce of the soil: and such a claim, which might leave nothing for the owner of the soil, is wholly inconsistent with the right of property in the soil. But the spring of water is supplied and renewed by nature; it must have flowed from a distance by an underground channel; and when it issues from the ground, till appropriated for use, it flows onward by the law of gravitation. While it remains in the field where it issues forth, in the absence of any servitude or custom giving a right to others, the owner of the field, and he only, has a right to appropriate it; for no one else can do so without committing a trespass upon the field; but, when it has left his field, he has no more power over it, or interest in it, than any other stranger" (*r*).

Spring  
water.

Smith v.  
Kenrick.

In the case of *Smith v. Kenrick* (*s*) it was maintained that it is the right of each of the owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his mine and use the water underground in the manner most beneficial and convenient to himself,

(*r*) 4 Ell. & B. 702; see also *Ennor v. Barwell*, 2 Giff. 410, on appeal, 4 L.T. N.S. 597.

(*s*) 7 Com. Bench, 515, 561; see

also *Humphries v. Brogden*, 12 Q.B. 753; *Firmstone v. Wheeley*, 2 Dowl. & L. 203; *Duke of Beaufort v. Morris*, 6 Hare, 346.



although the natural consequence might be that some pre-judice would accrue to the owner of the adjoining mine; but he must not trespass upon his neighbour's barriers so as to cause the water to flow into his neighbour's mine (*t*). Reasonable use of underground water for mining.

The same principle was sustained in the case of *Chasemore v. Richards* (*u*), on the ground that everything under the surface, whether it be solid rock or porous ground, or part soil and part water, belonged to the owner of the surface, as incident to the land *ex jure naturæ*. But there must be a reasonable use only of the water underground (*v*), and it is not improbable that if the water was extracted from the soil for purposes foreign to the soil, to the injury of adjoining lands, that such a use would be held unlawful (*w*).

It may be doubted, notwithstanding what fell from Lord Denman in *Acton v. Blundell* (*x*), whether there can be a claim by prescription to underground water. Lord Wensleydale, in the above-mentioned case of *Chasemore v. Richards*, said he did not think that the principle of prescription was applicable to such a case, although Coleridge, J., in the same case, may be said to have raised a question whether a right to water percolating through the earth might not be acquired on the ground of long and uninterrupted enjoyment. But if we remember that the common law principle of prescription presumes a grant—that open adverse enjoyment in such cases is the evidence of such a grant, and that the right itself is rather *ex jure naturæ* than an easement attached to land, we shall find some difficulty in supporting a prescriptive right to subterranean waters (*y*). By the Code Napoleon low lands are subjected to those more elevated, to receive the waters naturally running from them, and neither the proprietor of the high or low land can do anything to prevent the natural flow of the water. In the absence of prescription or other lawful title, the proprietor of the soil may use all springs in his land at pleasure, Code Na-  
poleon.

(*t*) *Clegg v. Dearden*, 12 Q.B. 576; *Powell v. Aiken*, 4 K. & J. 343; *Williamson v. Baird*, 10 Jur. N.S. 154.

(*u*) 29 L.J. Ex. 87; ante p. 491.

(*v*) *Walker v. Fletcher*, 3 Bli. 172.

(*w*) See dictum of Lord Wensley-

dale in *Chasemore v. Richards*, 29 L.J. Ex. p. 88; 7 House of Lords' Cases, 349.

(*x*) Ante, p. 501.

(*y*) Ante, pp. 327, 446, 489, 491, 494.

and he has a right to cut a way for running water to flow through his land from an adjoining proprietor's land. Servitudes, apparent and continual, whether as respects water or otherwise, may be acquired by grant, or by a possession for thirty years; but continual servitudes *non-apparent* (which would seem to include underground water) and continuable servitudes, apparent and non-apparent, can only be created by deed (*z*). The law of servitudes, however, in France, cannot be said to be very firmly settled, but several useful treatises have been published on the subject (*a*).

American  
law.

The law of America on the subject of underground water has recognized the principles of the law as established in this country, and the Civil Code of Louisiana contains similar provisions to those of the French Code concerning servitudes for drawing water from the well of another, and includes servitudes of aqueduct and drain as among *continuous*, and that of drawing water among the *discontinuous* servitudes (*b*).

ARTIFI-  
CIAL  
WATERS  
AND  
WATER-  
COURSES.

It was stated in the case of *Magor v. Chadwick* that artificial water-courses, in the absence of special custom, were not generally distinguishable in law from natural ones (*c*), but that doctrine has been materially qualified by subsequent cases. Where, for instance, an artificial water-course was granted for temporary purposes, it was held that no action will lie for a diversion thereof by the grantor, and that the right to artificial water-courses, as against the party creating them, must depend upon the character of the water-course and upon the circumstances under which it was created (*d*). The law does not authorize the occupiers of a mine on a higher level to interfere with the gravitation of the water, so as to make it flow into a mine on a lower level (*e*).

Where an artificial water-course has been made to pass through two estates, when jointly held by the same person,

(*z*) Code Nap. art. 640-644, 690, 691, ante, p. 443.

(*a*) Duranton, Cours du Droit Français, 144; Merlin Répertoire de Jurisprudence, tit. Cours d'Eau.

(*b*) Civ. Co. Louisiana, art. 716-732, 768-770.

(*c*) 11 Ad. & Ell. 571; *Arkwright v. Gell*, 5 M. & W. 203.

(*d*) *Sutcliffe v. Booth*, 32 L.J. Q.B. 136; *Wood v. Waud*, 3 Ex. 776; *Greatrex v. Hayward*, 8 Ex. 291; s.c. 22 L.J. Ex. 137; *Whaley v. Laing*, 2 H. & N. 476; 3 H. & N. 675, 901.

(*e*) *Williamson v. Baird*, 10 Jur. N.S. 154.

it will be difficult, when a severance of the two estates takes place, to decide the extent of the rights of the owner of each estate to the water-course (*f*).

How far an easement in an artificial water-course can be acquired by one not owning the land through which it is constructed was raised in the case of *Beeston v. Weate* (*g*). The authorities do not go the length of affirming that prescriptive rights may not be acquired in artificial water-courses, but rather that the mode of acquiring such prescriptive rights is different to the mode of acquiring similar rights in natural streams; and this doctrine was afterwards maintained by Chief Baron Pollock, in *Wood v. Waud* (*h*), who said: "We entirely concur with Lord Denman that a water-course, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible; but, on the other hand, the general proposition, that, under all circumstances, the right to water-courses, arising from enjoyment, is the same whether they be natural or artificial, cannot possibly be sustained. The right to artificial water-courses, as against the party creating them, surely must depend upon the character of the water-course, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments, clearly stands on a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character and liable to variation." The same principle was recognized in *Simpson v. Hoddinott*, and has not since been departed from (*i*). But a water-course, though artificial, may have been originally made under such circumstances, and have been so used as to give all the rights that the riparian proprietor

Prescriptive rights.

(*f*) *Wardle v. Brocklehurst*, 29 L.J. Q.B. 145.

(*g*) 25 L.J. Q.B. 115; 5 Ell. and B. 986; see also *Baer v. Martin*, 8 Blackf. (U.S.), 317; *Prescott v. White*, 21 Pick. (U.S.), 341.

(*h*) 3 Ex. 777; s.c. 18 L.J. Ex. 305.

(*i*) 26 L.J. C.P. 148; see also *Briscoe v. Drought*, 11 Ir. C.L. 266, 274.



would have had if it had been a natural stream; and in an action by one riparian proprietor against another for the pollution and diversion of a water-course, it was held a misdirection to tell the jury, that, if the stream were artificial and made by the hand of man, the plaintiff could have no cause of action (*i*).

American  
law.

In America the distinction between prescriptive rights in natural and artificial waters does not seem to have been so clearly settled as in England (*j*); nevertheless, there, the terms in which an artificial water-course is created must be considered in determining the extent and mode of its use, and in the absence of an express grant defining the extent and mode of application to use of an artificial water-course, reference must be had to such use as had previously existed (*k*).

#### SECTION IV.

##### RIGHTS OF WAY—WAY-LEAVES.

*A right of way not necessarily a right of way for all purposes—when for limited purposes—a grant in gross, is personal—Prescriptive right; how affected by unity of ownership—pleading the right—Way-leaves—when under a grant of way-leaves a railway may be made—by locomotive power—construction of rights of way, way-leaves, waggon-way, under a reservation for obtaining minerals—are ways capable of exception or reservation out of grant of land—ways of necessity.*

A right of  
way not  
necessarily  
a right of  
way for all  
purposes.

A RIGHT of way is not to be affected by a declaration of title under the 25 & 26 Vic. c. 67. If a right of way is acquired under and by virtue of a grant, the right will be construed most liberally for the grantees (*l*). But a right of way does not necessarily imply a right of way for all purposes, and it may even exist for all purposes except one, as, for instance, the carrying of coals (*m*). There may be a right of way over the land for farming purposes, which

(*i*) *Sutcliffe v. Booth*, 32 L.J. Q.B. 136.

(*j*) *Watkins v. Peck*, 13 N.H. (U.S.) 360, 370; *Wheatley v. Chrisman*, 24 Penn. St. Rep. 298, 304; *Hoffman v. Stowe*, 7 Cal. (U.S.), 46.

(*k*) *Tyler v. Wilkinson*, 4 Mason (U.S.), 397, 407; *Lee v. Stevenson*, 1 Ell. B. & Ell. 512; s.c. 27 L.J. Q.B. 263.

(*l*) *Ballard v. Dyson*, 1 Taunt.

279; *Roberts v. Karr*, 1 Taunt. 495; *Harding v. Wilson*, 2 B. & C. 96; *Plant v. James*, 5 B. & Ad. 791; *Dand v. Kingscote*, 6 M. & W. 197; *Bishop v. North*, 12 L.J. Ex. 362; *Wardle v. Brocklehurst*, 29 L.J. Q.B. 146.

(*m*) *Marq. of Stafford v. Coyney*, 7 B. & C. 257; *Henning v. Burnet*, 8 Ex. 187.

would not imply a right to carry coal for the working of a mine under the surface (*n*). But a right of way for carriages and hogs is *primâ facie* evidence of a right of way for all cattle, and the onus of proving the restriction lies on the grantor, and a right of carriage-way will comprehend a foot-way as well as a horse-way (*o*) although probably not a drift-way; but a foot and horse-way do not imply a right to carry even manure in a wheelbarrow, although he who wheels it travels on foot (*p*). A right of way for all manner of carriages does not necessarily imply a right of way for all manner of cattle (*q*). Still, if a way has been used for several purposes, it is an inference that there is a right of way for all purposes, but if the evidence shows a usage for one purpose, or for particular purposes only, an inference of a general right would hardly be presumed. Whenever the right exists there must be a reasonable exercise of the right (*r*).

The distinction between a right of way for a limited or for general purposes, as also the manner in which the grantee may defeat his own right is illustrated in the case of the South Metropolitan Cemetery Company *v.* Eden (*s*), Jervis, C.J., in delivering judgment, said: "This is not like the case of *Henning v. Barnet* (*t*), where the grant was of a right of way to a particular place for a particular and limited purpose. If I grant a man a way to a cottage which consists of one room, I know the extent of the liberty I grant; and my grant would not justify the grantee in claiming to use the way to gain access to a town he might build at the extremity of it. Here the grant is general, to use the road for the purpose of going to or returning from the land conveyed, or any part thereof: it is not defined, as in the case referred to. But whether the plaintiffs had or had not a right to alter the position of the gates as described in the plan, it is quite clear that they had a right of way along the road in question to the upper end of the land; and the defendant having obstructed that

Limited  
purposes  
only.

(*n*) *Higham v. Rabett*, 5 Bing. N.C. 622; *Cowling v. Higginson*, 4 M. & W. 245.

(*o*) *Davies v. Stephens*, 7 Carr & P. 570.

(*p*) *Brunton v. Hall*, 1 Q.B. 792.

(*q*) *Ballard v. Dyson*, 1 Taunt. p. 285.

(*r*) *Hawkins v. Carbines*, 27 L.J. Ex. 44.

(*s*) 16 C.B. 57.

(*t*) *Ante*, p. 506.

way by the excavation of the road in the manner stated, the plaintiffs have, it is conceded, a right of action, unless that right is affected by the doctrine of suspension, which, I must confess, I do not understand. The plaintiffs have a right of way to the upper end of their land. Suppose they do not choose to have a gate at all, but build up a wall along the whole line, why may they not say, when we want to exercise our right, we will knock down our wall? I think the plaintiffs have done nothing to defeat the right granted to them; and that, whether there were two gates or only one, the defendant had no right to obstruct the way in the manner he has done."

A grant in gross, is personal.

If the way be granted in gross, it is personal only, and cannot be assigned (*u*).

The existence of the right is a question for the judge, the extent of the right and the reasonable use of the way, are questions for the jury (*v*).

Prescriptive right.

Under a plea of a prescriptive right, it was formerly necessary to show a user of it for all purposes, time out of mind, according to the usual terms on which such plea is pleaded, but the claims to rights of way have since been provided for by the 2nd section of the Prescription Act (*w*). If a person entitled to a right of way by prescription, afterwards becomes the owner of the soil, over which the right is exercised, for the same extent of interest in the land as in the right of way, the prescriptive right will, by such unity of possession, become extinguished (*x*); but as there will be no merger unless the duration of the two interests are the same, if the same person becomes entitled to the right and the land for different durations of interest, the right will, in such an instance, only be suspended. Where the right of way is extinguished by unity of possession, it will, in some cases revive, as by partition among parceners.

Pleading right.

In pleading a right, care should be taken to aver the extent of the right, as will be seen by a reference to the case

(*u*) *Weekly v. Wildman*, 1 Ld. W. 256; *Hawkins v. Carbines*, 27 L.J. Raym. 407; *Ackroyd v. Smith*, Ex. 44.  
 10 C.B. 164; s.c. 19 L.J. C.P. (*w*) Ante, pp. 327, 335.  
 315; *Bailey v. Stevens*, 31 L.J. C.P. (*x*) *Wardle v. Brocklehurst*, 29 L.J. Q.B. 146; *Bailey v. Stephens*, 226, 229.

(*v*) *Cowling v. Higginson*, 4 M. & suprâ.



of *Midgley v. Richardson* (y), wherein Mr. Baron Rolfe said: "The question is, whether the plea sufficiently avers that the Derwent Colliery from which the coal in question was to be conveyed, was a mine belonging to the Bishop's see. The averment that the lands were parcel of *the manor*, is equivalent to an averment that they were parcel of *the demesnes*. But they might be part of the demesnes, which were copyhold, and the mines might by the custom belong to the copyhold tenant; and, as the plea is to be taken most strongly against the party pleading, we think the mines are not sufficiently alleged to belong to the see.

The grant of a right of way, or the power to make a way, will not be confined to such ways as were in use at the time of the grant. Thus, the reservation in 1630 of a sufficient way-leave (z) was decided in 1830 to enable the then owner to make a railway. Lord Wensleydale (when Mr. Baron Parke) in delivering judgment said: "The reservation is to be construed according to the rule laid down in Sheppard's 'Touchstone,' 100; in the same way as a grant of the owner of the soil of the like liberties: 'for what will pass by words in a grant will be excepted by like words in an exception.' Now the reservation is a right to dig a pit or pits (which pits are mentioned in the compensation clause to be such as may thereafter happen to be sunk), and of sufficient *way-leave* and *stay-leave* connected with these pits. There is no doubt that the object of the reservation is to get the coals beneficially to the owner of them, and therefore it should seem that there passes by it a right to such a description of way-leave, and in such a direction, as will be reasonably sufficient to enable the coal-owner to get from time to time all the strata of coal to a reasonable profit: and therefore the owner is not confined to such a description of way as is in use at the time of the grant, and in such a direction as is then convenient" (a).

In another case, where the owner of an estate was au-

(y) 14 M. & W. 608.

(z) Way-leaves in the coal districts of the North of England, are called outstrokes.

(a) *Dand v. Kingscote*, 6 M. & W. 197; *Pit v. Lady Claverineth*, 1 Barn. 318; *Senhouse v. Christian*, 1 T.R. 560.

thorized by Act of Parliament to make railways or roads to convey coals, ironstone, limestone, marble, or other stone or minerals over the lands of another person, it was held that the power extended to the making of railroads to be traversed by locomotive engines. Mr. Baron Parke, in delivering judgment, said: "I think the defendants in this case have a right to make the proposed road for carrying coals by any reasonable means, provided it does not create a nuisance. The power given by the Act is to make any railway; and it is not shown that the term railway has any definite meaning, requiring it to be made on the level; and I cannot think that it can be qualified by showing that, at the time of the passing of the Act, a particular species of railway, unlike the one contemplated, was in use. The power is general to make railways over the lands or grounds of any person or persons, making satisfaction for the damages to be occasioned thereby. The railroad in question must, however, be properly adapted to the purpose, and reasonable care must be taken that it does not become a nuisance to the public or to individuals" (b).

Construction of rights of way, way-leaves, waggon-way.

The construction to be placed on the reservation of a right of way, "way-leave," "waggon-way," came before the court in 1842 (c). The Dean and Chapter of Durham being seized in fee of certain lands, granted a lease thereof to one W., in the year 1832, reserving to themselves the mines, quarries, and seams of clay, with power to work the said minerals and to carry the same away with free ingress, egress, and regress, way-leave and passage, to and from the same, or to or from any other mines, quarries, seams of clay, lands and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever, for the purposes aforesaid, and particularly of laying, making, and granting waggon-way or waggon-ways in or over the said premises or any part thereof, paying reasonable damages for spoil of ground to be thereby done, upon the adjudication of two indiffe-

(b) *Bishop v. North*, 11 M. & W. 426; s.c. 12 L.J. Exch. 362.

(c) *Durham & S. Ry. Co. v. Walker*, 2 Q.B. 940.

rent persons to be chosen by the parties. Afterwards the lessors granted to a railway company, for a term, liberty to enter the demised lands, and to make and maintain a double main road or way over them, in a specified line, and to use, and grant the use of such way for the conveyance of passengers, coals, and goods. The company then made a railway over the lands, which W., before the last mentioned grant, had demised to a tenant. W. sued the company for damage to his reversion. The company pleaded the reservation in the first-mentioned indenture, which they alleged to have been made between the Dean and Chapter of the one part, and W., the plaintiff, of the other part, and averred that they, as the servants, and by command of the Dean and Chapter, entered for the purpose of making, and made, over the demised lands, a road or way, being such a road or way as was within the intent and meaning, and could and might be made by virtue of the reservation. It was proved on the trial that the railway was adapted, and of proper width, for carrying on a traffic in coals with certain parts of the county; that a railway fitted for such traffic would also carry passengers, which, however, would make no difference to the land, but only increase the wear and tear of the rails: that the railway was not yet formed over plaintiff's land, but had reached a point within three hundred yards of it, and that from that point, passengers were carried on the railway. The judge in summing up, directed the jury that, if the railway was made over plaintiff's land for other purposes besides the carrying of coals or other minerals, it was not within the reservation and they must find for the plaintiff; which they did. On a bill of exceptions, and writ of error, the Court of Exchequer Chamber awarded a venire de novo, and held: 1st. That the right reserved to the Dean and Chapter was only that of making and using ways and granting way-leaves for the purpose of getting the excepted wood and minerals; not for general purposes; nor for carrying coals and minerals, from whatever mines gotten; nor for carrying coals and minerals of their own, gotten elsewhere than on the demised lands. 2nd. But that, if the road, when made, was such as the reservation authorized,

Way-leaves restricted to the getting of minerals.



Not capable  
of excep-  
tion or re-  
servation.

Way-  
leaves in  
the North.

the intention to use it for a purpose not authorized was no ground for an action by the reversioner, though, if the intent were carried into effect, the tenant might be entitled to bring trespass. 3rd. That the proper questions for the jury were, whether, when the road was formed, it had become necessary or expedient for the railway company to make a road for the purpose of getting the excepted minerals; and, if so, whether the road made was a proper road for that purpose, assuming that it would be used for no other. 4th. That a right of way cannot, in strictness, be made the subject either of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation. A right of way reserved (using that word in a somewhat popular sense) to a lessor, as in the present case, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same manner as a right of sporting or fishing, which has been lately much considered in the cases of *Doe dem Douglas v. Lock* (*d*) and *Wickham v. Hawker* (*e*). It is not indeed stated in this case that the lease was executed by the lessee, which would be essential in order to establish the easement claimed by the lessors as in the nature of a grant from the lessee; but we presume that in fact the deed was, according to the ordinary practice, executed by both parties, lessee as well as lessors. Tindal, C. J., concluded the judgment in the case by saying that, "It was pressed in the argument on behalf of the plaintiffs in error, that general way-leaves, or powers of granting rights of way, over lands demised, as easements reserved to grantors or lessors are so very usual in the North of England, and often constitute so very valuable a property, that the court will so construe the reservation as to carry out this presumable intention. But to this we cannot accede. Indeed, if we were to hazard a conjecture on this subject, we should be strongly disposed to think that the words in the present lease, and which it was suggested are the same that occur generally in leases from the Dean and

(*d*) 2 A. & E. 705.

(*e*) 7 M. & W. 63.

Chapter, were probably introduced long ago, before the great importance of way-leaves had been fully felt or understood either by grantor or grantees, and when really nothing more was thought of than the subject-matter actually excepted, and what was necessary for the purpose of making that available; and that the same words have been subsequently retained without much attention to their precise import. Be that, however, as it may, we are clearly of opinion that the ways referred to in the exception in this case are confined to ways necessary or proper for enabling the lessors to get the matters excepted, and, in like manner, that the powers mentioned in the latter part of the exception, and particularly the power of granting rights of way, are powers which can only be exercised 'for the purposes aforesaid,' that is, for the purpose of getting the excepted trees, mines, and minerals" (*f*).

In the case of *Richards v. Richards*—re Glamorganshire Canal Act (*g*)—it was decided that where the proprietor of a mineral district had power to make roads and railroads over land of other persons from his mines to a canal, he was not restricted to the shortest way, but might adopt any more circuitous route which he found more expedient, provided he did not wander over the estate in an unreasonable manner.

Ways of necessity arise whenever the owner of two estates conveys one of those estates to another person, the estate so conveyed being then either entirely surrounded by the estate remaining in the possession of the grantor, or partly by his land and partly by that of strangers, provided always that there is no access to the land so conveyed; in such a case the grantee is entitled to a right of way over the land so remaining in the hands of the grantor in order that he may have access to, and be enabled to enjoy the estate so conveyed to him (*h*). Where several conveyances are made

Ways of  
necessity.

(*f*) 2 Q.B. 968; see also *Wallis v. Harrison*, 11 L.J. Ex. 440; *Arkwright v. Gell*, 5 M. & W. 203; *Midgley v. Richardson*, 14 M. & W. 608; *Newmarch v. Brandling*, 3 Swanst. 99.

(*g*) *John*. 255.

(*h*) *Clarke v. Rugge*, 2 Roll. Abr.

60; *Morris v. Edgington*, 3 Taunt. 24; *Pinnington v. Galland*, 9 Ex. 1; *Proctor v. Hodgson*, 10 Exch. 824; *White v. Leeson*, 5 H. & N. 53; *Wissler v. Hershey*, 23 Penn. St. Rep. 333; *Ogden v. Grove*, 38 Penn. St. Rep. 487.

at the same or at different times of portions of the same estate, the priority or order of the conveyance will not destroy the right of any of the grantees; and if no way existed before the conveyance, the owner of the estate over which the right is to be exercised may designate the way in a reasonable manner and at the least inconvenience to himself (*i*). When the way is once selected it cannot be altered except by consent of all the parties entitled to use it (*j*). The right to a way of necessity is limited in respect to its duration; if, therefore, an access to the estate shall at any time be acquired by the owner thereof, either by the purchase of other land or by the making of a public road, or in any other manner which affords such access, the way of necessity ceases, in other words, the way of necessity over the estate of the original grantor ceases so soon as the necessity ceases (*k*).

(*i*) *Pinnington v. Galland*, 9 Ex. 1; *Russell v. Jackson*, 2 Pick. (U.S.), 574; *Smiles v. Hastings*, 24 Barb. (U.S.), 44.

(*j*) *Morris v. Edgington*, 3 Taunt. 24; *Holmes v. Seely*, 19 Wend. (U.S.), 507.

(*k*) *Morris v. Edgington*, and *White v. Leeson*, *suprà*; *Mold v. Wheatcroft*, 29 L.J. Ch. 15.



## CHAPTER XVIII.

RATING OF MINES, MINERALS, AND QUARRIES, AND OF  
WAYS AND OTHER EASEMENTS.

POOR'S RATE  
HIGHWAY RATE  
COUNTY RATE  
CHURCH RATES  
TITHES.

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 POOR'S RATE.

*Poor Law Act, 43 Eliz. c. 2—no mine but a coal mine rateable. When iron is mixed with coal—exclusive occupancy—Quarries of all minerals are rateable. Tolls and dues when payable in kind, are rateable—chargeable to occupier of land—Justices' jurisdiction—but tolls or dues reserved in specie, are not rateable. Ores in a partially smelted state. Tolls or dues payable by custom—residence not necessary. The principle of rating coal-mines—result of decisions—when rateable to two parishes. Commons and Waste lands—principle of rating mines in enclosed lands. Rights of Way, Way-leaves, and Easements, in England, not rateable. Rating of Mines, Ways, and Easements, in Ireland.*

THE Poor Law Act, 43 Eliz. c. 2, s. 1, imposes a tax Poor's rate. upon "every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, appropriations of tithes, coal mines, or saleable underwood," within the parish, "for and towards the necessary relief of the lame, impotent, old, blind, and such other being poor and not able to work," within the said parish. Under and by virtue of this statute it was decided that no mine except a

Coal mines  
only are  
rateable.

coal mine was rateable to the poor (*a*); although, as Lord Ellenborough observed, the word "coal mine" was probably mentioned in the statute only by way of example, and not of exclusion (*b*), and notwithstanding a more recent opinion of Chief Justice Tindal that if the statute was now to be reviewed it would probably be held not to exclude any mine (*c*). But whether by accident or intention, the law remains the same to the present time, viz. that no *mine* except a coal mine is liable to the poor's rate. When a mine is not liable to be rated, the proprietors will not be liable to a rate for engines, machinery, buildings, or any other erections, erected and used solely for the purpose of effectually working the mines, either on or beneath the surface, or for drawing water from off the mine, such erections being regarded as part and parcel of the mine; but all smelting mills, furnaces, machinery, and buildings necessary for smelting the tin are not regarded as part and parcel of the mine, and are therefore rateable (*d*).

When iron  
is mixed  
with coal.

It frequently happens that iron is intermixed with coal, and in such cases it was formerly doubted whether the entire productions of the mine, including the iron as well as the coal, was not rateable; and in the case of *Rex v. Cunningham* and others (*e*), where the lessees and occupiers of a large tract of land and of mines which had been discovered under the said land, containing iron and coal intermixed, were rated to the poor in one sum for the farm and land, and in another sum for the iron and coal mines, although sufficient coal only was raised for the purpose of manufacturing the iron, and not for sale; but on appeal the rate was disallowed, the court holding that the lessees and occupiers were not rateable for the iron, but only for the coal, and that inasmuch as they had been rated for both the iron and coal in one entire sum, the rate being bad as to one, was bad as to both, for the court had no means of

(*a*) *Lead Company v. Richardson*, 3 Burr. 1341; 1 W. Black, 389; *Atkins v. Davis*, Cald. 318, 325; *R. v. Cunningham*, 5 East, 478; *R. v. Sedgely*, 2 B. & Ad. 65; *R. v. Brettell*, 3 B. & Ad. 424; *R. v. Dunsford*, 2 Ad. & Ell. 568; 4 Nev. & Man. 349.

(*b*) *R. v. Baptist Mill Co.* 1 M. & S. 617.

(*c*) *Crease v. Sawle*, 11 L.J. M.C. 62.

(*d*) *R. v. Bilston*, 5 B. & C. 851.

(*e*) 5 East, 478.

ascertaining how much was applicable to the one and how much to the other.

In the case of *Rex v. Trent and Mersey Navigation Company* (*f*), a distinction is drawn between a privilege to obtain minerals, and the sole and exclusive occupancy of a mine. In the former instance the company, which had taken materials from a quarry, for their own use, for a period of twenty years, under a power reserved to them, were held not to be rateable, on the ground that the right was a mere privilege, not exclusive, and which might therefore be granted by the owner to any other person. Exclusive occupancy necessary.

But although mines, except coal mines, are exempt from poor rates under and by virtue of the statute of Elizabeth, minerals are not exempted, and consequently if minerals be raised in any other way than by means of a mine, they will be liable to the rate. Minerals frequently are raised from quarries, quarries of minerals are therefore rateable; and as the question has been often raised, whether the working for ores, or the raising of metallic, and even non-metallic, substances, amounts to a mine or a quarry, we have already attempted to draw a distinction between the two (*g*). Quarries of minerals are rateable.

In all cases of rating, the justices of the peace are to determine whether the workings amount to a mine, and must not leave that question for the decision of the court above (*h*). Justices' jurisdiction.

Tolls or dues reserved in kind in respect of all mines are also rateable, on the ground that the reservation is a portion of the land itself, and that the persons entitled to them are the actual occupiers of the land (*i*). From the time of the decision in *Rowls v. Gells* (*j*) to the present, the law has undergone but few changes in this respect, and the judgment of Mr. Justice Le Blanc, in the case of *Rex v. Baptist Mill Company*, contains a clear exposition of the law. He says (*k*): "The question has always been Tolls and dues reserved in kind are rateable.

(*f*) 4 B. & C. 57.

(*g*) Ante, p. 143.

(*h*) *R. v. Dunsford*, 2 Ad. & Ell. 568.

(*i*) *Rex v. Baptist Mill Co.* 1 M. & S. 617; *R. v. St. Austell parish*, 5

B. & Ald. 693; Minutes of Evidence taken before Select Committee of House of Commons in 1856, p. 324.

(*j*) Cowp. 451.

(*k*) 1 M. & S. 618.

Judgment of Le Blanc, J.



whether the party rated could or could not be brought within the description of the statute of Elizabeth. The statute describes this class of persons as occupiers of lands, houses, tithes, coal mines, or saleable underwood. The construction that has been put upon the statute has been this, that because the Legislature expressed coal mines, it did not mean to include any other mines; and the reason given for such a distinction was, that other mines were considered as matters of hazard at that time, and therefore it was concluded that the Legislature did not mean to subject the occupier of such a species of property to taxation. It remains, then, to be seen what construction the decisions have put on the words 'occupier of land,' in order to determine whether a party who is in the receipt of a considerable revenue, which is not subject to risk, and arises out of land, may not be comprehended under the term occupier of land. In determining this, we are not tied down to follow the strict definition of land through all its consequences and in every possible view in which it may be considered, and to decide whether this would enable the party to maintain trespass (*quare clausum fregit*), or whether it corresponds in every other incident with the definition of land. In *Rowls v. Gells* (1) it was considered that the lord who received a stipulated benefit from the profits or value of mines, in case they did prove of value, was an occupier jointly with the adventurers, and not excusable, upon the same ground that excused the adventurers, namely, that the adventure was uncertain, or might prove unsuccessful; but the lord was held for the purpose of being rated, as an occupier. Here the party shares with the adventurer without incurring any risk, and *Rowls v. Gells* determined such person to be chargeable as occupier. What reason is there for saying that *Rowls v. Gells* was an erroneous decision? It is not necessary in construing the words of this statute, which was passed for a particular purpose, to hold that the word 'lands' should satisfy every possible view under which land may be considered. Here it is enough that the party is an occupier of

Chargeable  
as occupier  
of land.

(1) Cowp. 451.

land for the purpose of being rated to the relief of the poor. Where a person receives, without risk, part of the produce extracted from the bowels of the earth, he is an occupier of land; but where he merely receives a rent, or money payment, there the Court has held, as in *Rex v. Bishop of Rochester* (*m*), that he is not an occupier. It is said, however, that we ought to overturn *Rowls v. Gells* and *Rex v. St. Agnes* (*n*), unless we can distinguish them from this case; but I see no reason why the Court should hold those cases to have been improperly determined, especially where they have laid down a rule of construction which has prevailed for nearly forty years, and has been the guide of the courts below. As to distinguishing them, I cannot feel the weight of the observations which have been made with that view. In *Rowls v. Gells* and *Rex v. St. Agnes* the rate was confined to the person in respect of the toll-dish of lead and tin raised; here the owner of the land was entitled to a certain portion of the ore when raised, which he lets, or allows persons to stand in his place as to that share; and we will not inquire whether this was a legal demise, for he authorizes them to receive, and they do receive it. They stand, therefore, in the situation of the lessee in *Rowls v. Gells* and the person entitled in *Rex v. St. Agnes*. But subsequent cases have been cited, in which it is supposed that the authority of *Rowls v. Gells* and *Rex v. St. Agnes* has been disturbed; which supposition is only raised, by laying hold of particular expressions of the Court, to be found there. The cases of *Williams v. Jones* (*o*) and *Rex v. Nicholson* (*p*) are totally different; for those were the profits of a ferry, arising out of a right to convey passengers over a river; it was impossible in those cases to say that the persons were occupiers of anything but the boat and tackle in which the passengers were conveyed, in the same manner as a stage-coachman is the owner of his coach; it was therefore impossible to make the doctrine of *Rowls v. Gells* bear on those cases. Viewing all the cases on the subject, and the principle upon

(*m*) 12 East, 353.(*n*) 3 T.R. 480.(*o*) 12 East, 346.(*p*) 12 East, 330.

which *Rowls v. Gells* was decided, and likewise the public convenience, as regards this species of property, and not seeing that the original construction on the words, 'occupier of land,' may not comprehend a person so far an occupier as to receive a portion of the land discharged of any risk, I cannot say that this company is not rateable."

Judgment  
of C.J.  
Tindal.

In the case of *Crease v. Sawle* (q), Tindal, C.J., says: "We feel that we are equally bound by the same authority; and, important as it is, in all branches of the law, to abide by previous decisions, in none is it more important than in this. The rules which apply to the rateability of property are every where daily acted upon in the management of parochial affairs, and materially affect the value of estates. It would be extremely inconvenient, and indeed mischievous, to overrule a class of cases which have been much discussed and sanctioned by many eminent judges, and which are now constantly acted upon, because we might not feel perfectly satisfied with the reasons assigned for their decision. And, if we could permit ourselves to disregard these authorities on that account, we might feel disposed, on the same ground, to reject others, which have put a construction on the statute of 43 Eliz. c. 2, which we should be by no means sure that it ought to bear, if we were now for the first time called upon to explain the meaning of its language; which would seem to have been framed with a view to render rateable all occupiers of every description of real estate; and it might be very questionable whether occupiers of mines of any description were exempt. But we think it wiser to abstain from the discussion of such questions, and to abide by the construction which numerous decisions have given to the words of the statute, and which has been for a long time constantly acted upon; and, according to these decisions, whilst we must hold that the occupier of every mine, except coal mines, is exempt, we feel ourselves equally bound to hold, that he who receives a portion of the ore in an unmanufactured state, is liable to be rated."



But tolls or dues reserved in money, are, on the authority of the before-mentioned cases, not rateable to the poor, because such a reservation is a certain fixed payment or rent reserved out of the produce of the land not amounting to a reservation or an occupancy of the land itself. On this subject, Taunton, J., in the case of *Rex v. Tremayne*, is reported to have said (*r*): "The distinction is very subtle, but the cases may, perhaps, be reconciled by distinguishing between a reservation of a rent and a reservation of part of the soil; in the latter case, the lessor has been considered as occupying that part of the soil which he has so reserved; here, there is a pecuniary rent reserved and no reservation of any part of the soil."

Tolls or dues reserved in specie, not rateable.

A reservation of a portion of the ore, in a smelted state, is in the nature of a money reservation, and therefore not rateable; if in a state only fit to be smelted, it is like a reversion of part of the soil, and consequently rateable (*s*).

Ores in a smelted state.

Tolls or dues payable by custom, as in the case of tin-bounding, are subject to the rate; and residence is not necessary to create the liability to pay the rate, whether the reservation is by custom or by deed (*t*).

Custom.

Residence.

The principle on which coal mines are rated or exempted from rates is contained in the Parochial Assessment Act, 6 & 7 Will. IV. c. 96. It is there provided that no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain the property in a state to command such rent; the Act also provides that nothing therein contained is to be construed to

The principle of rating Coal Mines.

(*r*) 4 B. & Ad. 170.

12 Ad. & Ell. 816; s.c. 10 L.J. M.C.

(*s*) *R. v. Earl of Pomfret*, 5 M. & S. 139; *Crease v. Sawle*, 2 Q.B. 862; *R. v. Tremayne*, *suprà*; *Reg. v. Todd*,

14.

(*t*) *Crease v. Sawle*, *suprà*; *Rex v. Paynter*, 7 Q.B. 255.

alter or affect the principles, or different relative liabilities, if any, according to which different kinds of hereditaments were then by law rateable. Rates by the Act are required to be made in a given form, and owners of tenements may compound for the rates in the same manner as before the passing of the Act. The Poor Law Commissioners are directed to ascertain the proper rateable value, and justices of the peace may hear appeals against any rate.

Result of  
decisions.

The result of the decisions of the courts, both before and since the passing of the Act, may be said to consist in the following propositions: 1st. That a coal mine is liable to be rated, although no profit may have been derived from the mine. The occupancy of the mine makes the property rateable (*u*). 2nd. That a coal mine must be rated as soon as it is set at work and produces coal, and only during the time that it is productive. Lord Ellenborough, C.J., illustrated this principle in the case of *Rex v. Bedworth* (*v*), wherein his lordship said: "The mine itself being exhausted the subject-matter of profit is gone, and that being rateable only for the concurrent annual value during the period for which the rate is made, if the mine occupied no longer affords any such concurrent annual value, the subject matter of the rating is gone." 3rd. That the criterion of value does not necessarily depend upon the actual amount of rent paid to the landlord, but on the sum for which the land or property would let (*w*); consequently the improved annual value of a mine will be the subject of a rate (*x*). All fixed machinery, whether underground or on the surface, must be included in the valuation, without considering whether the machinery be real or personal property, so as to be liable to distress or seizure under legal process, or whether it would descend to the heir or executor, or belong at the expiration of the lease to the landlord or tenant (*y*). Where a poor's rate was made upon two-thirds of the net rent of land and one-half of the net rent of a colliery,

(*u*) *R. v. Parrot*, 5 T.R. 593.

(*v*) 8 East, 387.

(*w*) *R. v. Attwood*, 6 B. & C. 277;  
*R. v. Trustees of D. of Bridgwater*, 9  
B. & C. 68.

(*x*) *R. v. Ld. Granville*, 9 B. & C.  
188.

(*y*) *Reg. v. Guest*, 7 Ad. & Ell.  
951.

allowance being made for repairs, it was held that this was a fair criterion of the annual value (*z*). The condition of the mine, its prospects, and other similar circumstances, are often ingredients in the calculation. A fictitious value which a mine acquires from peculiar circumstances must not be mistaken for the probable amount of rent for which the mine would let to a *bonâ fide* company (*a*). Where a royalty was payable for bricks, together with a fixed annual charge for the land made use of, it was held, that the royalty and charge might properly be considered as the rent; that the payment in respect of the brick-earth was not the less a rent because the subject-matter of the renting was in the course of being wholly consumed; that in the absence of proof to the contrary, the number of bricks which the "stools" could make are the number which may be presumed to have been actually made within a given year; and that no deduction was to be made for the breeze, ashes, or any other materials used in making the bricks, it being presumable that these were allowed for in fixing the royalty (*b*).

Sometimes it happens that coals are taken from lands situate in two different parishes, and brought to surface by means of a shaft situate in one of the parishes only. In such a case it has been held that the coal mine is liable to be rated to both parishes, and that the shafts and machinery are rateable to the parish in which they are situate (*c*).

By the 17 Geo. II. c. 37, it is provided that if any dispute or uncertainty shall arise or exist as to which parish waste lands which have been or shall be improved or drained shall lie or ought to be rated, the occupier of such lands, tenements, tithes, and *mines*, shall be rated to the relief of the poor and to all other parochial rates to the parish which lies nearest to such lands; and if any dispute arises thereon the justices in general Quarter Sessions are to determine the same. Where lands were enclosed under and by virtue of an Act of Parliament which declared, that all the allotments to be set to the several persons having

When rateable to two parishes.

Commons and waste-lands.

How mines rated.

(*z*) *R. v. Tomlinson*, 9 B. & C. 163.

(*a*) *R. v. Birmingham Gas Co.* 1 B. & C. 506.

(*b*) *R. v. Westbrook & R. v. Everist*,

10 Q.B. 178; s.c. 16 L.J. M.C. 87.

(*c*) *R. v. Foleshill*, 2 A. & E. 593.



the right of common, should be deemed to be situate within the same parish respectively in which the ancient lands were, it was held that the Act only affected those portions of the soil which had been allotted to the commoners, and not the coal mines which were situate under the allotments, and consequently that the coal mines were rateable to the relief of the poor of the parish in which the mines were actually situate, notwithstanding that the allotments were rateable elsewhere (*d*).

Rights of  
way-leaves  
and ease-  
ments, not  
rateable.

No person can be rated in respect of a right of way, of way-leaves, waggon-way, or similar incorporeal rights, because they are in their nature incapable of occupation; but a rate may be made for such rights in respect of land in the actual and exclusive occupation of such persons in or over which such rights are exercised, and if, therefore, the same person is in possession of the land and of the easement, he will be subject to the rate (*e*). The rules which are adopted in rating railways will be the best guide in rating all other rights of ways (*f*).

Ireland.

The rating of mines, ways, and easements, in Ireland, is provided for by the 1 & 2 Vic. c. 56, s. 63, wherein it is declared that the following "hereditaments shall be rateable hereditaments under this Act, viz. all lands, buildings, and *open mines*; all commons and rights of common, and all other profits to be had, received, or taken out of any land; all rights of fishery; all canals, navigation, and rights of navigation; and rights of way and other rights or easements over land, and the tolls levied in respect of such rights and easements and all other tolls: Provided always, that no turf bog or turf bank used for the exclusive purpose of cutting or saving turf, or for taking turf mould therefrom for fuel or for manure, shall be rateable under this Act, unless a rent or other valuable consideration shall be payable for the same; and provided also that no *mines*

(*d*) *R. v. Pitt*, 5 B. & Ad. 565.

(*e*) *R. v. Jolliffe*, 2 T.R. 90; *R. v. Bell*, 7 T.R. 598; *R. v. Milton*, 3 B. & Ald. 112; *R. v. McDonald*, 12 East, 324; *R. v. Chelsea Waterworks*, 5 B. & Ad. 156.

(*f*) *Rex v. Kingswinford*, 7 B. &

C. 236; *R. v. Milton*, *suprà*; *R. v. Barnes*, 1 B. & Ad. 113; *Rex v. Trent & Mersey Navig. Co.* 1 B. & C. 545; *R. v. London & Brighton & S. C. Ry. Co.* 20 L.J. M.C. 124; *R. v. Gt. W. Ry. Co.* 18 L.J. M.C. 145; s.c. 15 Q.B. 380.

which have not been opened seven years before the passing of this Act shall be rateable until the term of seven years from the time of opening thereof shall have expired; and *no mines* thereafter to be opened shall be rateable until seven years after the same shall have been opened; and *mines bonâ fide* re-opened after the same shall have been *bonâ fide* abandoned shall be deemed an opening of mines within the meaning of this Act." And the rates are to be estimated according to the same principle as that adopted for assessment in England, as will appear from the 64th section of 1 & 2 Vic. c. 56, wherein it is provided that every rate "shall be a poundage rate made upon an estimate of the net annual value of the several hereditaments rated thereto; that is to say, of the rent at which, one year with another, the same might, in their actual state be reasonably expected to let from year to year, the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain the hereditaments in their actual state, and all rates, taxes, and public charges, if any, except tithes, being paid by the tenant." Rates are to be made in a form prescribed by the statute, and the commissioners are empowered to examine the property and correct any existing rate (*g*), and every rate, made under the authority of the Act, is to be paid to the person authorized to collect the same, by the person in the actual occupation of the rateable property at the time when the rate was made, and on his default, by the person subsequently in the occupation of the rateable property, from whom such rate shall be demanded, except when the annual value of property does not amount to £5, in which case the lessee may be rated (*h*). The rate may be appealed against (*i*).

(*g*) Secs. 65-70.

(*h*) Sec. 72.

(*i*) Secs. 106-112.

## HIGHWAY RATE.

*Mines and quarries, when rateable—Special provisions respecting South Wales.*

What  
mines and  
quarries are  
rateable.

Highway rates are now generally regulated by the 5 & 6 Will. IV. c. 50, and by section 27 of that statute, it is provided: "That a rate shall be made, assessed, and levied by the surveyor upon all property now liable to be rated and assessed to the relief of the poor; provided that the same rate shall also extend to such woods, *mines, and quarries of stone (j)*, or other hereditaments as have heretofore been *usually* rated to the highways, and provided also that every such rate shall be signed by the said surveyor, and allowed by two justices of the peace, and published in the same way as poor rates are now allowed and published." The rate must be made upon the occupier (*k*), and we have, therefore, only to consider what *mines* which were exempt from poor rates, were *usually* liable to the highway rates, in order to bring them under the above-mentioned statute. The cases of *Reg. v. Rose* and *Reg. v. Saunders (l)* decide that the words "usually rated" contemplate that which was the usual mode of rating in the particular parish before the passing of the Act, and that the above-mentioned section includes all mines of the same class as those which had been usually rated; that mines not rateable to the relief of the poor opened into a parish since the passing of the above Act, are rateable to the highway rate, if mines of a similar description were, before the Act, usually rated to the highways in that parish.

South  
Wales.

By 14 & 15 Vic. c. 16, special provisions are made respecting highways situate in the counties of Glamorgan, Brecknock, Radnor, Carmarthen, Pembroke, and Cardigan, and by the 23 & 24 Vic. c. 68, secs. 22, 44, it is provided that the highway rate shall be "levied on the persons and in respect of the property by law rateable to the relief of the poor in the respective parishes, and shall be assessed

(j) See ante, p. 143, for definition of a quarry.

(k) Sec. 29.

(l) 6 Q.B. 153; 24 L.J. N.S. M.C. 57.



upon the net annual value of such property ascertained by the rate for the time being for the relief of the poor, provided that the rate shall also extend to such woods, mines, and quarries of stone, or other hereditaments as were, before the Act of 5 & 6 Will. IV., usually rated to the highways; and the overseers of the parish shall, for the purpose of levying such rates, proceed in the same manner, and have the same powers, remedies, and privileges, as for levying money for the relief of the poor; and all such rates shall be allowed in the same manner, and be subject to all the same provisions in relation to appeal and to excusing persons from payment on account of poverty, and otherwise, as the rate for the relief of the poor in the same parish."

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#### COUNTY RATE.

*Property liable to poor's rate is also liable to the County Rate.*

By the 55 Geo. III. c. 51, all messuages, lands, tenements, and hereditaments, liable to the payment of the poor's rate, is also made liable to the county rate; and by the 56 Geo. III. c. 49, provision is made whereby extra parochial and other places, though not deemed rateable for the relief of the poor, are to be rated to the county rate. It would seem, therefore, that mines and quarries, as well as tolls and dues which are subject to the poor's rates are also liable to county rate.

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#### CHURCH RATES.

Mines and quarries appear to be liable to church rates under the description of land (*m*).

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#### TITHES.

*Mines not usually tithable, but tithes are payable in Derbyshire. Rent-charges.*

In general, tithes are due and payable *de jure* for every-thing which yields an annual increase, but not for anything

Tithes not usually payable.

(*m*) See Godol. Appx. 10, 11.

Prescription or custom. that is of the substance of the earth, as stone, lime, chalk, or other minerals (*n*); but by prescription or custom, even minerals, or anything else which is part of the soil, as a brick kiln or salt works, may be subject to the payment of tithe (*o*). A prescription to pay tithes of one thing in lieu of tithes of another thing, is not good (*p*).

Quarries. Quarries of stone are not tithable, on the principle, that land must not pay a double tithe (*q*). When minerals are tithable, the tithe may be payable out of the produce in its natural state, which is in the nature of a predial tithe; or it may be payable after a proper allowance is made for the expenses of raising and dressing the ore and other incidental expenses, when it becomes a kind of personal tithe (*r*).

Derbyshire. In the parish of Wirksworth in Derbyshire, mines are subject to tithes, by custom; a fortieth part of the value of the lead ore is actually paid, but it is understood that a tenth is legally due, although not enforced, on account of the poverty of some of the mines (*s*).

Rent-charges. By the Statutes for the Commutation of Tithes into Rent-charges, the term "tithes" is defined to mean and include any uncommuted tithes, portions or parcels of tithes, and all moduses, compositions real, and prescriptive and customary payments, and special provisions are inserted therein for the commutation of mineral tithes; and wherever mines or minerals subject to tithes are commuted by the Act, into rent-charges, the rent-charge is to be subject to all such parliamentary, parochial, and county and other rates, charges, and assessments, as the tithes were subject to before such commutation (*t*).

(*n*) 11 Co. 13, 14; 2 Inst. 651; Cro. Eliz. 277; Buxton v. Hutchinson, 2 Ver. 46; 1 Eq. Ca. Ab. 386; Stiles's Case, 1 E. & Y. 361; Godol. 430, appx. 12.

(*o*) 2 Vern. 46; 1 Roll. Ab. 637, 642, s. pl. 7, 8; 1 Mod. 35; 2 Mod. 77; Buxton v. Hutchinson, 2 Vern. 46, p. 4; Godol. 430.

(*p*) Godol. 431.

(*q*) Godol. 436.

(*r*) Burn's Ecclesiastical Law.

(*s*) See Minutes of Evidence taken before Select Committee of House of Commons, in July, 1856, p. 25; Pilkington's Derbyshire, 111-118.

(*t*) 6 & 7 Will. IV. c. 71; ss. 12, 44, 69, 90; 2 & 3 Vic. c. 62, s. 9.

## CHAPTER XIX.

## REGULATION AND INSPECTION OF MINES.

*INSPECTION of all Mines. Employment of boys and girls under certain ages prohibited—boys under certain ages not to have charge of engines, machinery, tackle, &c.—who to be deemed in charge—penalties—5 & 6 Vic. c. 99—23 & 24 Vic. c. 151.*

*GUNPOWDER may be kept on Mines and Quarries—23 & 24 Vic. c. 139. Powers of Secretary of State. Jurisdiction of Justices.*

*WAGES—payment of miners' and apprentices' wages—how, when, and where—Coal and Ironstone Mines, payment by weight. When the owners are declared Bankrupts. Jurisdiction of Justices in cases of dispute—when master is absent—Appeal.*

*MISDEMEANORS, by miners and apprentices generally—when there is a special contract—when the Apprentice absents himself—cases within the Stannaries of Cornwall and Devon—Appeal. Misdemeanors in Coal and Iron Mines, waste and enclosed lands—filling in shafts—stacking coal—damaging materials. Complaints against masters for cruelty or ill-treatment. Proceedings before Justices in all the above matters.*

*COMBINATIONS of masters and workmen—masters and labourers must be left free—Bonds to counteract combinations illegal—6 Geo. IV. c. 129; 22 Vic. c. 34; 24 & 25 Vic. c. 100.*

*COAL AND IRONSTONE MINES.—Special provisions for inspection of Coal and Ironstone Mines—13 & 14 Vic. c. 100; 18 & 19 Vic. c. 103; 23 & 24 Vic. c. 151—Appointment and duties of Inspectors—Maps and plans for Inspectors—penalties for obstructing Inspectors—report of Inspectors. Duties of Coroners. The duties of Owners and Agents—when accidents occur—Fences to abandoned mines—penalties. General and Special Rules, Ventilation, &c. 23 & 24 Vic. c. 151—penalties—a certified copy of special rules to be received in evidence. Prohibition of single shafts—Arbitrations in cases of dispute—mode of conducting arbitrations—enforcing compliance with Act—Agreements in contravention of Act are illegal—23 & 24 Vic. c. 151 and 25 & 26 Vic. c. 79 to be construed as one Act—Appeal. Scotland.*

By the 3rd section of 5 & 6 Vic. c. 99 one of Her Majesty's principal Secretaries of State is authorized to appoint Inspectors of all Mines and Collieries, with

Inspection  
of all  
mines.



power for the inspector, to enter and examine such mines and collieries, and the works, buildings, and machinery belonging thereto; to inquire into the state and condition of the persons working therein, and whether the requirements of the Act were being properly observed. The owner or occupier of every mine and colliery or their agents, are required to furnish the means necessary for such inspection, and after such inspector has completed his duties, he must make a report thereof in manner to be pointed out by the Secretary of State. The Act is not limited in its operation to any particular district, or any particular class of mines. Therefore, the tin and copper mines of Cornwall and Devon and all other mines as well as collieries, whether situate in those counties or elsewhere in Great Britain, would now seem to be placed under the superintendence of Government Inspectors.

Employ-  
ment of  
boys and  
girls.

The 5 & 6 Vic. c. 99 prohibits the employment of all females whatsoever, of any age, and of all males under ten years of age, *within* any mine or colliery whatsoever, and declares indentures of apprenticeship of females under the age of eighteen entered into for that purpose to be absolutely void (a); and by the 4th section of the above-mentioned Act it is enacted, that from and after the passing of this Act, no person shall take any apprentice who shall be bound to work, or be liable to be called on to work, or be otherwise employed, *within* a mine or colliery, who shall be under the age of ten years, or for a longer term of apprenticeship than eight years, except as the apprentice of a mason, joiner, engine-wright, or other mechanic whose services may be required occasionally below as well as above ground; and every indenture of apprenticeship whereby any person shall be hereafter bound contrary to the provisions of the Act is declared by the Act to be absolutely void; and when any person who is now serving under articles of apprenticeship within any mine or colliery shall attain the age of eighteen years, he shall be discharged from such apprenticeship, and the articles of apprenticeship thereby become absolutely null and void.

(a) Secs. 1, 2.

Penalties are imposed upon persons misrepresenting the age of the employed, and for employing them when prohibited by the statute (*b*); and agents who act in contravention of the provisions of the statute, upon their own responsibility, without the knowledge of the principal, are subjected to the penalties (*c*).

The prohibition against employing females, and boys under the age of ten, does not prevent their being employed above ground (*d*). But there are some important exceptions to this regulation contained in the 8th & 9th sections of the Act, and also in the 23 & 24 Vic. c. 151. By the 1st section of the latter Act the period of ten years is extended to twelve years, except for boys between the ages of ten and twelve who obtain certificates from a competent schoolmaster respecting their education and school attendance (*e*); but every person who gives a false certificate (*f*) for the above purpose is liable for every such offence to a penalty not exceeding £10, and such offence is to be dealt with as an offence against the said Act of 5 & 6 Vic. c. 99.

By the 8th section of 5 & 6 Vic. c. 99 it is provided that, where there shall be any entrance to a mine or colliery by means of a vertical shaft, or pit, or inclined plane, or where there shall be any communication within any part of a mine or colliery to any other part thereof by a vertical shaft, or pit, or inclined plane, it shall not be lawful for any owner of such mine or colliery to allow any person or persons other than a male of the age of fifteen years and upwards to have charge of any steam-engine or other engine, windlass, or gin (whether driven or worked by manual labour or any other power whatsoever), or to have charge of any part of the machinery, ropes, chains, or other tackle of any such engine, by or by means of which engine, machinery, ropes, chains, or other tackle, persons are brought up or passed down any such vertical shaft, or pit, or inclined plane; and any person or persons offending against the said provisions, is to forfeit

Charge of  
engines,  
machinery,  
&c.

Penalties.

(*b*) Secs. 3, 5, 6, 17, 21, 22.

(*c*) Secs. 13-16.

(*d*) Sec. 7.

(*e*) Sec. 2.

(*f*) Sec. 3.

Charge of  
engines,  
machinery,  
&c.

for every such offence a sum not exceeding £50 nor less than £20, to be recovered before two justices of the peace (*g*). The 4th section of 23 & 24 Vic. c. 151 provides that, "It shall not be lawful in any such case as in the said provision (last mentioned) for the owner of the mine or colliery to allow any person other than a male of the age of eighteen years or upwards to have charge of any steam-engine, or of any part of the machinery, ropes, chains, or other tackle of any such engine, by or by means of which engine, machinery, ropes, chains, or other tackle, persons are brought up or passed down any such vertical shaft, or pit, or inclined plane;" and any person offending against that enactment is subjected to the penalty imposed by the last-mentioned provision. In the case of a windlass or gin worked by a horse or other animal, the person on the bank under whose direction the driver of the animal used for such windlass or gin is to be deemed and taken to be the person having the charge thereof (*h*).

Penalties.

Who to be  
deemed in  
charge.

Gun-  
powder.

By the 19th section of 23 & 24 Vic. c. 139 it is provided, that it shall be lawful for any person to keep, exclusively for the use of any mine, quarry, or colliery, any quantity of gunpowder, not exceeding three hundred pounds weight at any one time, in any magazine or warehouse, so as such magazine or warehouse be within two hundred yards of such mine, quarry, or colliery, and (unless erected and used for that purpose before the passing of the Act) be not within two hundred yards of any inhabited house, without the consent in writing of the occupier of such house; and any person may keep exclusively for the use of one or several mines, quarries, or collieries, any quantity of gunpowder not exceeding four thousand pounds at any one time in any magazine, so as such magazine be well and substantially built of brick or stone, and except in cases where such magazine is erected or continued as a building for keeping gunpowder under a certificate of the Secretary of State as hereinafter mentioned, the magazine be within two hundred yards of the respective mine, quarry, or

(*g*) Sec. 17; Reg. v. Mainwaring, (h) Sec. 9 of 5 & 6 Vic. c. 99.  
27 L.J. M.C. 278.



colliery, or one of the mines, quarries, or collieries, for the use of which such gunpowder is kept, and not within any of the limits hereinbefore mentioned, or within two hundred yards of any inhabited house without the consent in writing of the occupier of such house. Moreover, the owners, lessees, or occupiers of any mine, quarry, or colliery, having for the use thereof a magazine not situated as required by the Act, or being desirous of erecting a magazine not so situated, may make application by memorial to one of Her Majesty's principal Secretaries of State in like manner, and for like causes, as before mentioned, respecting the continuance or erection of an expense magazine or store magazine within the prescribed distance, and the Secretary of State may, by his certificate, authorize the continuance or erection of the magazine to which the application relates, either absolutely or conditionally, on such precautionary measures being taken and maintained as he may deem proper.

Other provisions by the said Act are made for the keeping of gunpowder and for obtaining the sanction of the Secretary of State for the continuance or construction of any magazine within the prohibited limits (*i*), and justices of the peace in General Quarter Sessions assembled, are authorized to license places for making and keeping of gunpowder and other explosive substances (*j*). By the 24 & 25 Vic. c. 130, the power given to justices in Quarter Sessions is transferred to and vested in the justices in Petty Sessions assembled, within their respective and several divisions; and if justices refuse to grant the license, a memorial may be forwarded to the Secretary of State, who has power, notwithstanding such refusal of the justices, to grant the lease upon such terms as he may think fit (*k*).

By 1 & 2 Will. IV. c. 37 it is provided, that in all contracts entered into for the hiring of any artificer, workman, miner, or labourer, the wages due in respect thereof must be paid in the current coin of the realm only, unless the artificer, miner, or labourer, consents to receive Bank of <sup>Payment of wages.</sup>

(*i*) Sec. 3.

(*j*) Sec. 10.

(*k*) 23 & 24 Vic. c. 139, s. 14.

England notes, local notes, or drafts drawn upon and payable within certain prescribed distances, and heavy penalties are imposed by the statute upon persons acting in contravention of its provisions (*l*). If a person be employed to get coal from a mine, to be paid at a certain rate per ton, with liberty to employ other men to assist him, he is an artificer within the meaning of the Act, if by the contract he be bound to give his personal labour in performance of the work, consequently his wages must be paid in manner directed by the Act (*m*). And by section 10 of 5&6 Vic. c. 99 it is enacted: "And whereas the practice of paying wages to workmen at public-houses is found to be highly injurious to the best interests of the working classes: Be it therefore enacted, that from and after the expiration of three months from the passing of this Act no proprietor or worker of any mine or colliery, or other person, shall pay or cause to be paid any wages or money in respect of wages for work or labour or services done in or about any mine or colliery to any person employed in or about such mine or colliery, or to any person whatever entitled to or having authority or claiming to have authority to receive such wages, at or within any tavern, public-house, beershop, or other house of entertainment, or any office, garden, or place belonging thereto or occupied therewith, but all payments in respect of such wages are hereby strictly prohibited and forbidden to be made at or within such places as aforesaid, and all payments so made are hereby declared to be of no effect whatever. That notwithstanding any payment of wages or money in respect of wages which shall or may be made at any such prohibited place, the person or persons to whom such wages were due or payable, or but for such payment would be due or payable, shall and may recover and receive the same in like manner as if no such payments had been made. That in case any owner of any mine or colliery, or any person liable or entrusted or employed to pay any wages or money in respect of wages for such work,

Wages not  
to be paid  
at public-  
houses, &c.

Wages so  
paid  
recoverable  
as if not  
paid.

Penalty.

(*l*) Secs. 1, 8, 9, 19; *Sharman v. Sanders*, 13 C.B. 166; *Bowers v. Lovekin*, 25 L.J. Q.B. 371; *Archer v. James*, 1 Cox Mag. ca. 2. (*m*) *Weaver v. Floyd*, 21 L.J. Q.B. 151; *Bowers v. Lovekin*, 25 L.J. Q.B. 371.

labour, or services as aforesaid, shall, contrary to the provision lastly hereinbefore contained, pay or cause to be paid any such wages or money to any person whatever, at any such prohibited place as aforesaid, the person or persons so offending shall for every such offence forfeit a sum not exceeding £10 nor less than £5, to be recovered as in the Act provided."

And by section 28 of 23 & 24 Vic. c. 151, the wages due Coal mines. to every person employed in any coal mine, colliery, or ironstone mine, are to be paid to him or his representative, in money at an office to be named for that purpose in the special rules to be drawn up in pursuance of that Act, but such office must not be contiguous to any public-house or place where beer or spirituous liquors are sold, and every owner is liable to a penalty of £10 for acting contrary to this provision.

And by section 29 of 23 & 24 Vic. c. 151, where wages Payment by weight. are paid by the weight, measure, or gauge of the coal, ironstone, or other material gotten by them, such coal, ironstone, or other material shall be truly weighed, measured, or gauged accordingly; and one of the persons for the time being employed in such coal mine, colliery, or ironstone mine, is to be stationed at the place appointed for such weighing, measuring, or gauging, in order to take an account thereof, and to take an account of the weight, measure, or gauge used therein on behalf of such persons by whom he is so employed; but such person so employed is not in any way to impede or interrupt the working of the coal mine, colliery, or ironstone mine, or to interfere with the weighing, measuring, or gauging, but shall only be authorized to take such account as aforesaid, and the absence of such person is not to be a reason for delaying or interrupting such weighing, measuring, or gauging.

If the master or owner of a mine becomes bankrupt, the Bankruptcy. Court has power to order payment of the miners' wages to the amount of 40s. (*n*), leaving the miner to prove for the balance; and where apprentices have paid premiums, the Court has also power to order any sum which it thinks



proper to be paid to, or applied for the benefit of such apprentice.

Juris-  
diction of  
justices.

The 20 Geo. II. c. 19, s. 1, gives two justices of the peace (*o*) power to determine any difference or dispute which shall arise between a master and miner or collier, or other labourer employed in a mine, respecting the amount of wages due to the employed, and for this purpose to examine witnesses and to order the master to pay such wages as shall seem just and reasonable, not exceeding in amount the sum of £5. The amount awarded to the labourer must be paid within twenty-one days next after such order, but the 2nd section of the 4 Geo. IV. gives the justice power to order the amount of such wages to be paid, in cases where the employed is an apprentice, within such time as the justice may think proper, to an amount not exceeding £10. In case of non-payment of the wages, the justice may issue his warrant and levy the same by distress and sale of the master's goods and chattels. And by the 27 Geo. II. c. 20, such justice is directed to limit such warrant to a period of not less than four or more than eight days. The 4th section of 4 Geo. IV. c. 34 makes provision when the master resides or is absent from his place of business, and enables the employed, whether labourer or apprentice, in such an event, to summon the steward or agent of such master, and the justice has power to order the steward to pay such amount as shall appear to be justly due, not exceeding £10, and in default to issue a warrant of distress either against the goods of such master or the steward. The words, "such an amount as may seem just and reasonable," in the 1st section of the 20 Geo. II. c. 19, have given rise to some doubt whether the justices can entertain any claim for damages against the servant for neglect in his duties towards his master, so that such claim for damages might be set off against the wages due to the servant, but the question has been settled by a recent case in favour of the justices entertaining such questions (*p*). In order to give the magistrates jurisdiction, it is not necessary that the con-

When  
master is  
absent.

(*o*) 4 Geo. IV. c. 29, s. 1, gives power to one justice.

(*p*) See *Sharp v. Hainsworth*, 32 L.J. M.C. 33.

tract of service should be for any specified time; it is only necessary that the relation of master and servant should exist between the parties (*q*).

There is no right of appeal against any order of justices Appeal. for payment of wages under the aforesaid Act of 4 Geo. IV. c. 34, and the words in the 5th section of that Act, viz. "that every order or determination of justices under the Act should be final and conclusive," seem to take away indirectly any right of appeal which the master might previously have had against any decision under and by virtue of the aforesaid Act of 20 Geo. II. c. 19 (*r*).

By the 20 Geo. II. c. 19, s. 2, the justices are empowered to hear all complaints of misconduct made by a master Misde- meanors by miners. against any miner, collier, or other labourer (*s*), and to punish the offender, either by committing him to the House of Correction (*t*), for any reasonable time not exceeding one calendar month, or by abating some part of his wages, or discharging him from his employment; and in the case of an apprentice, by committing him to prison Apprentices. for any time not exceeding one calendar month; and by section 1 of the 4 Geo. IV. c. 34, the complaint may be made by the steward or agent of the master.

When a contract is entered into by any miner, collier, or Contracts. other labourer, for a certain fixed time, if the person so contracting shall absent himself before the completion of such contract, or be guilty of any other misdemeanor, a justice may, under the 4th section 6 Geo. III. c. 25, upon complaint made by the master, or his steward or agent, hear such complaint, and commit the offender to prison for any period not exceeding three calendar months. By section 3 of 4 Geo. IV. c. 34, the justices' power of enforcing contracts extends to contracts entered into in writing, even if the servant have not commenced the service, and to oral as well as written contracts commenced but not completed (*u*), but not to contracts entered into with

(*q*) *Willett v. Boole*, 1 Cox Mag. ca. 195; *Taylor v. Porter*, 31 L.J. M.C. 111.

(*r*) *Queen v. Bedwell*, 4 Ell. & B. 213.

(*s*) See *Finley v. Jowle*, 12 East, 248.

(*t*) *Wood v. Fenwick*, 10 M. & W. 195.

(*u*) *Askew's case*, 2 L. M. & P. 429;

*Ashmore v. Horton*, 29 L.J. M.C. 13;

*Lawrence v. Todd*, 2 Cox Mag. ca. 322.

infants, if to their disadvantage (*v*). In addition to the punishment of imprisonment, the justices may now abate the wages of or discharge the labourer from his employment. The summary jurisdiction given to justices extends only to cases where the relationship of master and servant exists in the ordinary acceptance of those terms; if, therefore, the master contracts with his servant to do a certain work for a certain price, the relationship of master and servant is destroyed, and the statute does not apply (*w*), unless the contract requires the servant personally to assist in the work (*x*). The Act applies to persons engaged in manual labour, but not to stewards, bailiffs, or agents appointed to overlook those so employed (*y*); and if a servant leaves his master under a *bonâ fide* belief that he had a right to do so, or for other good cause, he cannot be convicted under the statutes (*z*). A commitment of a servant under 4 Geo. IV. must show on the face of the conviction that the offence for which the servant was convicted fell within the statute (*a*), and the conviction and warrant may be in one or separate instruments (*b*).

Misde-  
meanors by  
appren-  
tices.

By the 6 Geo. III. c. 25 (*c*), when apprentices absent themselves from their master's services before the term of their apprenticeship shall have expired, a justice is empowered to oblige any such absenting apprentice, whenever he shall be found, to serve for such a period of time as he shall have absented himself, unless in the mean while he shall have made satisfaction to his master; or in default thereof, to commit such apprentice to prison. But the said Act is not to extend to apprentices paying their masters a fee of £10, or where seven years shall have expired next after the end of the term for which such apprentice contracted to serve. *Gray v. Cookson* (*d*) decided that the 4th section of 20 Geo. II. c. 19 is not repealed by the 1st section of

(*v*) *Reg. v. Lord*, 12 Q.B. 757.

(*w*) *Branwell v. Penneck*, 7 B. & C. 536; *Lancaster v. Greaves*, 9 B. & C. 628; *Sharman v. Sanders*, 13 C.B. 166; *Collier's case*, 3 Ell. & B. 607; *Taylor v. Porter*, 31 L.J. M.C. 111.

(*x*) *Bowers v. Lovekin*, 25 L.J. Q.B. 371; *Willett v. Boote*, 1 Cox Mag. ca. 195.

(*y*) *Davies v. Baron Berick*, 30 L.J. M.C. 84.

(*z*) *Rider v. Wood*, 29 L.J. M.C. 1; *Reg. v. Youle*, 1 Cox Mag. ca. 355.

(*a*) *Geswood's case*, 2 Ell. & B. 952;

(*b*) *Bailey's case*, 3 Ell. & B. 607.

(*c*) Secs. 1, 4, 5, 6.

(*d*) 16 East, p. 13; *Reg. v. Youle*, *suprà*.



6 Geo. III. c. 25, but that the remedy given to the master by the latter statute is cumulative to the punishment inflicted on the apprentice by the former statute.

It is declared by the 7th section of 20 Geo. II. c. 19, Stannaries of Devon and Cornwall. that that Act shall not apply to the Stannaries of Devon and Cornwall, but that section is afterwards repealed by section 2 of 27 Geo. II. c. 6, which extends the provisions of the first-mentioned statute to all tanners and miners who are or should be employed in the said Stannaries, but the subsequent Act of 6 Geo. III. c. 25 does not apply to the Stannaries.

By the 5th section of the 20 Geo. II. c. 19, power of Appeal. appeal to the Quarter Sessions is given against any determination, order, or warrant of any justice under that Act, save and except an order of commitment. There is likewise a power of appeal reserved under the 6 Geo. III. c. 25, s. 5, against any order, determination, or warrant of any justice under that Act, except on an order of commitment, upon such party complaining giving six days' notice of such appeal, and entering into recognizances as directed by the Act. But such appeal was held, in *Rex v. Staffordshire Justices (e)*, not to lie against an order of the justices containing a conviction and commitment, such conviction and commitment being considered one and the same thing, and therefore to fall within the above exception.

By the 1st section of 39 & 40 Geo. III. c. 77, provision Misdemeanors in coal and iron mines. is made for the punishment of any person who shall pull down or fill up, or attempt to pull down or fill up any shaft, or damage any road leading to any coal or iron work, or who shall wilfully dig, take, or carry away, or attempt to dig, take, or carry away, any coal, culm, or other mineral from any waste or enclosed lands. Colliers and miners disregarding their agreements with their employers, entered into by writing, or for wilfully working coal and ironstone in a manner different to what they had stipulated, or otherwise abandoning the agreement they had entered into, are liable to a fine of 40s., or in case of non-payment imprisonment for six months (*f*). Justices are also em-

(e) 12 East, 572; *Bailey's case*, 3 Ell. & B. 607.

(f) Sec. 6.

powered by the 4th section of the said Act to punish any miner, or collier, or other person, who shall be guilty of the offence of walling or stacking coals, or iron-stone, or iron ore, with intent to defraud their employers or fellow-workmen (*g*); and other offences are provided for by the said Act, such as the carrying away of materials belonging to any manufacturer or coal-dealer whatsoever, or for damaging any such materials not exceeding the value of 5s., with power for any justice to deal with such offences in a summary manner. An appeal is given by the said statute to the Quarter Sessions, but proceedings are not to be quashed for want of form or removed into any court of record. The Act is not to extend to any damage done underground by the owners of adjoining mines, or persons duly authorized by them to work in such adjoining mine.

Complaints  
against  
masters.

The justices are also empowered by section 3 of 20 Geo. II. c. 19, to hear complaints made by any apprentice against any master for refusal of necessary provisions, cruelty, or other ill-treatment, and if such complaint be proved, to discharge such apprentice from his apprenticeship. The Act only applies where the sum paid to the master as a premium did not exceed £5, extended by 33 Geo. III. c. 55, to £10, and by the 1st section of Geo. IV. c. 29, to any sum not exceeding £25. The 2nd section of the Act also gives justices power to hear all complaints by any servant, miner, collier, or other labourer against his master for refusal of necessary provisions, cruelty, or other ill-treatment, and such justice if satisfied of such complaint, is to discharge such employed person from his master's service. An appeal lies to the General Quarter Sessions (*h*) against any order of a justice under either of the aforesaid Acts. The misconduct of a master towards his apprentice or servant is now, in certain cases, made a criminal offence (*i*).

By 6 Geo. IV. c. 129, s. 3, it is provided that no person shall by violence to the person or property, or by

(*g*) Reg. v. Webb, 1 Moo. C.C. 431.

(*h*) Sec. 5.

(*i*) 24 & 25 Vic. c. 100, s. 26, and post, chap. xxiii.

threats (*j*) or intimidation or by molesting, or in any way obstructing another, force, or endeavour to force, any journeyman, manufacturer, workman, or other person hired or employed in any trade or business, to depart from his hiring, employment, or work; or prevent or endeavour to prevent any such person, not being hired or employed, from hiring himself to, or from accepting work or employment, from any person or persons. The Act does not apply to meetings held either by masters or workmen, for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meeting shall require for their work, nor to the payment of their workmen, nor the hours of working and employment, nor to any agreement, verbal or written, entered into among themselves for such objects and purposes (*k*); but the workmen must not meet and combine for the purpose of dictating to their masters whom they shall employ, as a combination for such a purpose is indictable as a conspiracy (*l*). Penalties are imposed upon offenders; justices of the peace are to hear complaints, and an appeal lies from their decision.

Combina-  
tions of  
masters  
and work-  
men.

In the case of the *Queen v. Rowlands* (*m*), Mr. Justice Pattison, in passing sentence on some workmen who had been convicted upon an indictment under the 6 Geo. IV. cap. 129, said: "The object of the Legislature was that all masters and workmen should be left free in the conduct of their business. The masters were at liberty to give what rate of wages they liked, and to agree among themselves what rate of wages they would pay. In like manner, the workmen were at liberty to agree among themselves for what wages they would work, and were not restricted in so doing by the circumstances that they were in the employ of one or other of the masters. The intention of the Legislature was to make them quite free."

Masters  
and  
labourers  
must be  
left free.

In *Walsby v. Autrey* (*n*), Cockburn, C. J., said: "I am decidedly of opinion that every workman, so long as he is

(*j*) *Reg. v. Rowlands*, 17 Q.B. 671;  
Ex. parte Perham, 29 L.J. M.C. 33;  
O'Neill v. Longman, 2 Cox Mag. ca. 348.

(*l*) *R. v. Bykerdike*, 1 Mood. & Rob. 179.

(*m*) 21 L.J. M.C. 81.

(*n*) 30 L.J. M.C. 122.

(*k*) Secs. 4, 5.



not bound by any contract, is entitled when in the service of an employer to the free and unfettered exercise of his own discretion, whether he will remain in that service in conjunction with any other workmen with whom he may not choose to serve; and, more than this, if several workmen consider others obnoxious, personally, or on account of character or conduct, they have a perfect right to the exercise of their discretion, and to put the alternative to the employer of either retaining their services by discharging the obnoxious persons, or of retaining the latter, and thus losing the others' services. And the master has a right to the opportunity of exercising his discretion in the matter. But if the men go further, and do not fairly give the master the alternative, but seek to coerce him by threats of doing something that is likely to operate to his injury, into the discharge of the obnoxious persons, then I think the case properly comes within the operation of the 3rd section of the Act."

22 Vic. c.  
34.

By the 22 Vic. c. 34, it is enacted, "That no workmen or other person, whether actually in employment or not, shall by reason merely of his entering into an agreement with any workman or workmen, or other person or persons, for the purpose of fixing or endeavouring to fix the rate of wages or remuneration at which they or any of them shall work, or by reason merely of his endeavouring peaceably and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work, in order to obtain the rate of wages, or the altered hours of labour so fixed or agreed upon, or to be agreed upon, shall be deemed or taken to be guilty of molestation or obstruction within the meaning of 6 Geo. IV. c. 129, and shall not therefore be subject or liable to any prosecution or indictment for conspiracy: Provided always, that nothing therein contained shall authorize any workman to break or depart from any contract, or authorize any attempt to induce any workman to break or depart from any contract." Whoever in pursuance of any unlawful combination or conspiracy to raise the rate of wages, shall assault any person, is guilty

24 & 25  
Vic. c. 110.

of a misdemeanor, and liable to imprisonment with or without hard labour (*o*). A bond entered into by employers to counteract combination of workmen is illegal, if it can be shown, that the bond operates in restraint of trade and is not strictly confined to the protection of legal rights (*p*). Bonds to counteract combinations illegal.

In addition to the foregoing provisions, the Legislature has passed several Acts for the inspection and regulation of Coal and Ironstone mines situate in Great Britain, and additional powers are given by these Acts, to investigate, the mode of ventilation (*q*), of lighting, and the condition of the machinery; for giving notice of accidents and holding inquests on deaths from accidents; for providing special and general rules, and respecting single shafts; in addition to other provisions for the inspection of the mines. The first of these Acts (*r*) was repealed by the 1st section of 18 & 19 Vic. c. 108, except as to penalties previously incurred, and which last mentioned statute has also been repealed except as to inspectors previously appointed, and penalties previously incurred (*s*). Subject as aforesaid, the inspection and regulation of all coal mines, collieries, and ironstone mines, in Great Britain (*t*), is now governed by the 23 & 24 Vic. c. 151, and 25 & 26 Vic. c. 79. Inspection of coal and ironstone mines.

The 7th section of 23 & 24 Vic. c. 151 declares that the provisions of that Act shall extend to all coal mines and collieries, and mines of ironstone of the coal measures, and worked in connexion with coal or with any disused or exhausted coal mines, and in the construction of such provisions, the terms, "coal mine or colliery or ironstone mine," is to mean every such mine and colliery as aforesaid, and every shaft in the course of being sunk, and every level or inclined plane in the course of being driven for commencing or opening any such mine, and all the works belonging 23 & 24 Vic. c. 151.

(*o*) 24 & 25 Vic. c. 100, s. 41.

(*p*) *Hilton v. Eckersley*, 25 L.J. Q.B. 199.

(*q*) *Knowles v. Dickinson*, 6 Jur. of Act.

N.S. 678.

(*r*) 13 & 14 Vic. c. 100, ss. 2, 7.

(*s*) 23 & 24 Vic. c. 151, s. 6.

(*t*) Ireland is excepted by 30 sec.

Meaning of terms in the Act.

thereto respectively. The term "owner," is to mean the immediate proprietor, lessee, or occupier of a coal mine or colliery, or ironstone mine, or of any part thereof. The term "agent," is to mean any person having on behalf of the owner the care or direction of the mine. The term "inspector," is to mean an inspector or inspectors appointed or continued under the Act. And the term "district," that portion of Great Britain assigned, or which shall be assigned, to any one of such inspectors. The word "sheriff," includes "sheriff's substitute."

Appoint-  
ment of  
inspectors.

By section 8, Her Majesty's Secretary of State is to appoint inspectors, and from time to time to remove such inspectors, but no person who shall act or practise as a land agent, or as manager, viewer, or agent, or mining engineer, or valuer of mines, or arbitrator in any matter or dispute arising between owners of mines, or be otherwise employed in any mine (*u*) shall act as inspector.

Duties of  
inspectors.

The powers and duties of inspectors (*v*) enable them to enter, inspect, and examine any mine, and the works and machinery belonging thereto at all reasonable times, but so as not to impede or obstruct the working of the mine; and to inquire into the condition and ventilation thereof, the mode of lighting and using the lights, and into all matters connected with the safety of the persons employed, and whether the provisions of the Act are complied with; and the owner of every mine is required to furnish the means necessary for such entry, inspection, examination, and inquiry. Notice of anything dangerous, with the particulars thereof, although not provided for by the Act or the general or special rules, is to be given by the inspector to the owner or agent, and to one of Her Majesty's principal Secretaries of State (*w*); and if the owner or agent object to remedy the danger or defect, he may, within twenty days after receipt of such notice, forward to the said inspector and to the Secretary of State a statement containing the grounds of such objection, together with a nomination of five or more competent persons who shall

(*u*) Sec. 9.  
(*v*) Sec. 16.

(*w*) Sec. 17.



not be interested in or employed in such mine, of whom the Secretary of State shall appoint one or more, to be an arbitrator or arbitrators, to determine the matters in difference.

By section 18, the owner or agent is required to produce true and complete maps or plans of the working of the mines for the inspector, and if the owners do not produce true and correct maps or plans, the inspector may require them to be made at the expense of the owner on the scale mentioned in the Act and in the form therein directed, but the inspector is not allowed to make a copy of any part of the said map or plan.

Maps and plans for inspectors.

By section 23, every person who wilfully obstructs any inspector in the execution of his duty, and every owner or agent of a mine who refuses or neglects to produce the required map or plan to such inspector, or to furnish him with the means necessary for making any entry, inspection, examination, or inquiry, under the Act, or who neglects or wilfully violates any provisions of the Act, for the neglect or violation of which no other penalty is imposed, is liable to a penalty not exceeding £10 for every such offence, to be recovered in a summary way before two justices of the peace, or in Scotland before the sheriff, within three months after the commission of the offence (x); and when recovered the penalties may be paid to the person who has sustained injury, or to the family or relatives of any person whose death may have been occasioned by any accident or offence under the Act, not being a person who occasioned or contributed to the accident, and save, as aforesaid, all penalties recovered under the Act, are to be paid into Her Majesty's Exchequer.

Penalties for obstructing inspectors.

Every inspector is obliged by the 27th section of the Act, on or before the 1st of March in every year, to make a separate and distinct report, in writing, of his proceedings during the preceding year, and to transmit the same to one of Her Majesty's principal Secretaries of State, who is to lay a copy of such report before Parliament.

Report of inspectors.

The duties of the coroner who holds any inquests on

Coroners.

(x) Sec. 25; Reg. v. Mainwaring, 27 L.J. M.C. 278.

deaths arising from accidents are pointed out in the statute. He may adjourn an inquest in certain cases specified in the Act, but before such adjournment he may receive evidence to identify the body, and may order its interment (y).

Owner or  
agent and  
their  
duties.

If the owner or agent of a mine does not comply with the provisions of the 17th section, either by removing the defects complained of by the inspector, or by forwarding the grounds of his objection to the inspector, within twenty days after being informed of such defects, or make nomination of five competent persons to arbitrate on the question; a penalty of £1 per day is inflicted for every day beyond the twenty days, and until such defects shall have been removed; and by the same section, where matters in dispute have been determined by arbitration, the owner or agent is liable to the same penalty if he neglects to remedy any defect according to the award of any arbitrator for every day after the receipt of a copy of such award, and until such defects have been remedied.

Accidents  
in mines.

By section 19, when loss of life or any personal injury occurs to any person employed in and about a mine, by reason of any explosion, or if loss of life, or any serious personal injury occurs to any person so employed, by reason of any accident within such mine or the works thereof, the owner or agent shall, within twenty-four hours after such accident and loss of life or personal injury, send notice thereof to the Secretary of State, if the accident occurred in England, or to the Lord Advocate if the accident occurred in Scotland, and also to the inspector of the district; and such notices must specify the probable cause of such accident, and may be sent through the post; a penalty of £20 is imposed for the omission to send such notice (z).

Fences to  
abandoned  
mines.

By the 21st section, in cases of the abandonment or discontinuance of a mine, or where the working thereof is recommenced after abandonment or discontinuance for a period exceeding two months, or where any workings are commenced for the purpose of opening a new mine, the owner or agent is to give to the inspector two months'

(y) Sec. 20.

(z) *Underhill v. Longridge*, 29 L.J. M.C. 65.

notice thereof by letter through the Post-office; and where any such mine is abandoned or the working is discontinued, the owner shall cause the same to be, and to be kept, securely fenced for the prevention of accidents (*a*).

Every owner or agent of a mine is also liable to heavy Penalties. penalties for not having proper rules established and preserved (*b*); and where no other penalty is imposed, every such owner or agent renders himself liable to a penalty of £10 for every offence contrary to the provisions of the said 23 & 24 Vic. c. 151 (*c*).

Section 10 of 23 & 24 Vic. c. 151, provides general General rules. rules to be observed in every colliery, coal, or ironstone mine. These are:—

1. An adequate amount of ventilation (*d*) shall be constantly produced in all coal mines or collieries and ironstone mines to dilute and render harmless noxious gases to such an extent that the working places of the pits, levels, and workings of every such colliery and mine, and the travelling roads to and from such working places shall, under ordinary circumstances, be in a fit state for working and passing therein.

2. All entrances to any place not in actual course of working and extension, and suspected to contain dangerous gas of any kind, shall be properly fenced off so as to prevent access thereto.

3. Whenever safety lamps are required to be used they shall be first examined and securely locked by a person or persons duly authorized for this purpose.

4. Every shaft or pit which is out of use, or used only as an air pit, shall be securely fenced (*e*).

5. Every working and pumping pit or shaft shall be properly fenced, when operations shall have ceased or been suspended.

6. Every working and pumping pit or shaft where the natural strata, under ordinary circumstances, are not

(*a*) Ante, pp. 212, 265; rule 4, (*d*) Knowles v. Dickinson, 29 L.J. below. M.C. 135.

(*b*) See sec. 22.

(*c*) Sec. 23.

(*e*) Ante, pp. 212, 265.



safe, shall be securely cased, or lined, or otherwise made secure (*f*).

7. Every working pit or shaft shall be provided with some proper means of communicating distinct and definite signals from the bottom of the shaft to the surface, and from the surface to the bottom of the shaft.

8. All underground self-acting and engine planes on which persons travel, are to be provided with some proper means of signalling between the stopping places and the ends of the planes, and with sufficient places of refuge at the sides of such planes at intervals of not more than twenty yards.

9. A sufficient cover overhead shall be used, when lowering or raising persons, in every working pit or shaft where required by the inspectors.

10. No single-linked chain shall be used for lowering or raising persons in any working pit or shaft, except the short coupling chain attached to the cage or load.

11. Flanges or horns of sufficient length or diameter shall be attached to the drum of every machine used for lowering or raising persons.

12. A proper indicator to show the position of the load in the pit or shaft, and also an adequate break, shall be attached to every machine, worked by steam or water power, used for lowering or raising persons.

13. Every steam boiler shall be provided with a proper steam gauge, water gauge, and safety valve (*g*).

14. The fly-wheel of every engine shall be securely fenced.

15. Sufficient bore holes shall be kept in advance, and, if necessary, on both sides, to prevent inundations in every working approaching a place likely to contain a dangerous accumulation of water.

Special  
rules.

In addition to the general rules, special rules (*h*) are also to be established and observed by every mine (*i*), but

(*f*) *Mellors v. Shaw*, 30 L.J. Q.B. 333.

(*g*) *Reg. v. Brown*, 26 L.J. M.C. 183.

(*h*) *Senior v. Ward*, 28 L.J. Q.B. 139.

(*i*) 23 & 24 Vic. c. 151, ss. 11, 13.

where special rules have already been provided, they are to remain the special rules till amended (*j*), and be of the same force as if established under the Act. Directions are given by section 13 for framing rules where no such special rules are now in force, and which are to be prepared and forwarded to the Secretary of State for approval within three months after the working of the mine or colliery shall be commenced or renewed. The Secretary of State may propose alterations or the substitution of other rules, and if the owners of the mine and the Secretary of State do not agree as to the special rules to be adopted, arbitrators are to be appointed; and in case of the death, refusal, incapacity, or neglect of any such arbitrator to act in the matter submitted to him, a substitute may be appointed; or if the owner of the mine fails to comply with the provisions of the statute, or if such owner do not within twenty days from the day on which such alterations or additions or such rules, by way of substitution, are proposed to him, object to the same; or does not, under the several circumstances mentioned in the statute, appoint an arbitrator, and give notice in writing of such appointment to the Inspector of the District, the special rules framed as aforesaid added to or modified by the Secretary of State, shall be established as the special rules of the mine.

The rules by section 14 may be amended from time to time, and by section 15 the special as well as the general rules are to be affixed in some conspicuous place at the mine, and at the place where the workmen are paid; and a printed copy of such general and special rules are to be supplied to all persons employed in and about the mine, who shall apply for the same. Special and  
general  
rules.

Particular attention is directed to these special and general rules, as a penalty of £20 is imposed on the agent or owner of the mine by the 22nd section, in case such rules have not been established or affixed on the mine as aforesaid, or have not after obliteration been restored, or in case of any wilful violation, or neglect of such rules by the owner, agent, or viewer of the mine. And a further Penalties.





mine, or to permit any person to be in such mine for the purpose of working therein, unless there are in communication with every seam of such mine for the time being at work at least two shafts or outlets, separated by natural strata of not less than ten feet in breadth, by which shafts or outlets distinct means of ingress and egress are available to the persons employed in the mine; but it shall not be necessary for the two shafts or outlets to belong to the same mine, if the persons therein employed have available means of ingress and egress by not less than two shafts or outlets, one or more of which may belong to another mine. This clause is not to apply to opening a new mine for the purpose of searching for or proving minerals, or to any working for the purpose of making a communication between two or more shafts, provided that not more than twenty persons are employed at any one time in the said new mine or working.

Section 4 provides that, if the owner of any existing mine objects, within the time mentioned in the 5th section, in writing addressed to one of Her Majesty's principal Secretaries of State, that by reason of the nature of the mine, or from its being nearly exhausted, or from any other special cause, he ought to be exempted from the obligation of providing an additional shaft or outlet in pursuance of the Act, or that he cannot provide an additional shaft or outlet within the time limited by the Act, the said matters are to be referred to arbitration, and the arbitrator is to decide if the owner shall be relieved from the obligation of providing an additional shaft or outlet, or have an extension of time granted to him for providing an additional shaft or outlet, and if the decision of the arbitrator is adverse to the owner; or if no award is made by reason of any default or neglect on the part of the owner, he shall be bound to comply with the provisions of the Act, in the same manner as if this section had not been enacted.

Appeal by owner of existing mine to arbitration.

The said 5th section provides that arbitrations, in pursuance of the Act, are to be conducted in manner directed by the thirteenth section of the 23 & 24 Vic., c. 151, in cases where the owner, within the twenty days therein

Mode of conducting arbitrations.

mentioned, objects to any alterations in or additions to rules, or rules by way of substitution proposed by the Secretary of State; but no objection by the owner of an existing mine is to be entertained unless it is made within the times following; that is to say, if he claims to be exempted from the obligation of providing an additional shaft or outlet within six calendar months after the passing of the present Act; and if he claims to have an extension of time for providing an additional shaft or outlet, within the six calendar months immediately preceding the 1st of January, 1865.

Power to  
enforce  
compliance  
with Act.

The 6th section gives superior courts of law and equity power, upon the application of the Attorney General acting on behalf of the said Secretary of State, to prohibit by injunction the working of any mine in which any person is employed in working, or is permitted to be for the purpose of working, in contravention of the provisions of the Act, and may award such costs in the matter of the injunction as the court thinks just; but without prejudice to any other remedy permitted by law for enforcing the provisions of the Act.

Agree-  
ments in  
contraven-  
tion of Act  
illegal.

Section 7th declares that no person shall be precluded by any agreement made before the passing of the Act from doing such acts as may be necessary for providing an additional shaft or outlet to a mine where the same is required by the Act, or be liable under any agreement to any penalty or forfeiture for doing such acts as may be necessary in order to comply with the provisions of the Act.

Construc-  
tion of Act.

The Act by the 8th and last section is to be construed with the 23 & 24 Vic. as one Act, and the aforesaid additional powers to be in addition to, and not in derogation of any powers conferred by such last mentioned Act, and all the powers given in such last mentioned Act may be exercised in the same manner as if the now recited Act had not been passed.

Appeal.

Inasmuch therefore as the two Acts of 23 & 24 Vic. and 25 & 26 Vic. are to be construed as one Act, and the said Act of 23 & 24 Vic. and that of 5 & 6 Vic. are also

to be read as one Act; the 21st section of 5 & 6 Vic. which gives an appeal to the quarter sessions to any person aggrieved by a conviction of any justice under the 5 & 6 Vic. is now extended to the provisions of the other two Acts. But all judgments, determinations, and proceedings of any justice not appealed from, or of such quarter sessions, are to be final and not subject to review by any court whatever. And no conviction or adjudication made on appeal shall be quashed for want of form, or be removed by certiorari into any of the superior courts of record (*p*).

The coal mines of Scotland are now mainly regulated Scotland. by the before-mentioned statutes. Further information may be obtained from "Barclay's Digest" (*q*).

(*p*) Sec. 22 of 5 & 6 Vic. c. 99.

(*q*) 2d. Edit. pp. 138, 596, 613.



## CHAPTER XX.

## THE COAL TRADE.

*The Coal Trade is free. Measuring keels, boats, carts, &c. Justices may fix retail prices of imported coals. Coals must be sold by weight. Penalties for selling one kind of coals for another. When coals are unfit for the specified purposes. Special contract for conveying coals by rail. Statutory contract, how proved. Duties on imported coals.*

*LONDON DISTRICT.—The Coal Exchange. Duties on Inland and Foreign coals entering the port. Borrowing money on duties. By-laws. Sales to be by weight. Selling one sort of coals for another—tickets on delivery—sacks—ships and carts—carts to be weighed with the coals—delivery of less quantity than purchased—weighing-machines with carts—coals and sacks to be weighed—weighing-machines to be kept at public places—certificate of quantity of coals to be delivered to be registered—penalties in respect of the above defaults how recoverable and applied. Limitation of actions—Patent fuel not liable to duties—Amendment Act, 1 & 2 Vic. c. 101, consequences of not delivering tickets when coals are delivered on purchaser's wharf direct—Duties continued to 1882, and extended to coals brought by railways, canals, or any other mode of conveyance within the London district. Coal-whippers' Acts expired.*

*LOCAL ACTS AND LAWS.—Brighton—King's Lynn—Northumberland and Durham, meaning of "loading in regular turn"—Newcastle-upon-Tyne—Ireland.*

Coal trade  
free.

COAL-OWNERS, lightermen, masters of ships, and others, having united themselves together for the purpose of keeping up the price of coals, it was thought necessary at one time by the Legislature to interfere to prevent such combinations, and accordingly three Acts of Parliament

were passed, viz. 9 Anne, c. 28, 4 Geo. II. c. 30, and 28 Geo. III. c. 53, wherein provisions were inserted to dissolve such compacts, and to prevent the future combination of persons for the purposes aforesaid; but these provisions failing in their object and proving injurious to the trade, were afterwards repealed by the 6 & 7 Will. IV. c. 109. Since this statute, merchants and others engaged in the coal trade are free to regulate and fix the price of coals.

By 9 Hen. V. c. 10; 30 Car. II. stat. 1, c. 8; 6 & 7 Will. III. c. 10; 11 Geo. II. c. 15, and 15 Geo. III. c. 27, commissioners were appointed for the admeasurement and marking of keels, boats, wains, carts, and other carriages used for the conveyance of coals in any port, and penalties to be recovered before a justice are inflicted for removing or altering the said marks; and by 52 Geo. III. c. 9 all ships and vessels in the coal trade carrying coals, culm, or cinders, must be measured and duties paid thereon according to the quantity of coal the ship is capable of containing.

Measuring  
keels,  
boats,  
carts, &c.

By statute 17 Geo. II. c. 35, any three county justices of the peace are authorized to set the rates and prices of all coals, "called sea coals," as should be brought by sea into any river, creek, haven, or port, except in the river Thames, to be sold by retail, allowing a reasonable profit to the said retailer, beyond the price paid by him to the importer, and the ordinary charges thereupon accruing; and if any retailer of such coals shall refuse to sell as aforesaid, then the justices of the peace respectively are authorized to empower one of their officers to enter into any wharf, or other place, where such coals are stored up, and to take and sell the coal at such rates as the said justices respectively shall judge reasonable, rendering to such retailer the money for which the said coals shall be so sold, less the charges and expenses thereby incurred; and if any action shall be commenced against the justices of the peace, constable, or any officer or person, for anything to be done in pursuance of the Act, the defendant in every such action may plead the general issue, and give the special matter in evidence; and if the verdict be found for him,

Justices  
may fix  
retail prices  
of imported  
coals.

or the plaintiff becomes nonsuited, such defendant shall recover and have his damages, and treble costs of suit, provided nevertheless, that no person interested in any wharf used for the receiving of coals, or who shall trade by himself or others, in his own or any other name, in the sale of any coals, not being for his own private use, shall act, or otherwise intermeddle in settling the price of such coals as aforesaid.

Coals to be  
sold by  
weight.

Coals must be sold by weight and not by measure, and by 5 & 6 Will. IV. c. 63, s. 9, it is enacted that every person who shall sell any coal, slack, culm, or cannel of any description, by measure, and not by weight, shall, on conviction, be liable to a penalty of not exceeding 40s. for every such sale. The proceeding necessary to be taken to recover the penalties is pointed out in the statute (*a*), and inspectors of weights and measures are to be appointed (*b*). All weights must be according to the imperial standard, as fixed by the Act, and all others are illegal (*c*). But it was held in the case of *Jones v. Giles*, that a contract for the sale of a certain number of tons of iron by the ton, "long weight," was not in contravention of that statute or of the 5 Geo. IV. c. 74 (*d*).

Penalties  
for selling  
one kind of  
coal for  
another.

Selling coals of a different description from those contracted for, is an offence under 3 Geo. II. c. 26, s. 4, for which heavy penalties are recoverable, and the place of delivery of such coals is the place where the cause of action arises (*e*).

When coals  
are unfit  
for the  
specific  
purposes.

If coals are sold for a particular purpose, for which they prove unfit, an action will lie for the recovery of damages, but in the case of the *Pacific Steam Navigation Company v. Lewis*, where the invoice described the coals as "steam coals," and the plaintiffs failed to prove that the invoice was part of their contract with the defendant, the plaintiffs were nonsuited, but afterwards leave was obtained to amend the declaration by alleging that the coals were unfit for

(*a*) Sec. 33.

(*b*) Sec. 17.

(*c*) Sec. 3.

(*d*) 10 Ex. 119, 137; s.c. 23 L.J. Ex. 292.

(*e*) *Butterfield v. Windle*, 4 East, 385.



working steam-engines and generating steam for steam-engines (*f*).

In the case of the Great Northern Railway Company *v.* the South Yorkshire Railway Company, where a bonâ fide agreement by deed was made and executed between the said two companies for the carrying of coals by the defendants on the plaintiff's railway, on condition of paying to the plaintiffs a certain toll, according to the quantity of coal carried, and the amount of dividend to be paid by the plaintiffs on the guaranteed as well as the capital stock of the company, it was held that the contract was not objectionable as being *ultra vires*, but one which the companies were competent to enter into (*g*).

Special contract for conveying coals by rail.

Where a statute requires a contract for the sale of coals to be signed by both the buyer and the factor, and entries thereof to be made in a book, which entries are to be evidence touching anything done under the act, the signature of the parties must be proved in the usual way (*h*).

Statutory contract.

No duties are now payable on coals imported or exported into this country (*i*).

Duties on imported coals.

An Act for regulating the vend and delivery of coals in the Cities of London and Westminster and in certain parts of the counties of Middlesex, Surrey, Kent, Essex, Hertford, Buckingham, and Berkshire, was passed in the first and second years of Will. IV. c. lxxvi., which act (after repealing part of the 9th Anne, c. 28, and also the Acts of 47 Geo. III. s. 2, c. 68 ; 56 Geo. III. c. 21 ; 57 Geo. III. c. 1 ; 57 Geo. III. c. 40, and 9 Geo. IV. c. 65) provides that (*j*) "the piece of ground called the Coal Exchange in London shall remain vested in the Mayor and commonalty of London, and be an open market (*k*), to be called the Coal Market, with power for the Lord Mayor and Alder-

LONDON DISTRICT.

1 & 2 Will. IV. c. lxxvi.

Coal Exchange.

(*f*) 16 M. & W. 783.

(*i*) 8 & 9 Vic. c. 90

(*g*) 9 Ex. 642 ; s.c. 23 L.J. Ex.

(*j*) Secs. 3, 4.

186.

(*k*) Sec. 4.

(*h*) Brown *v.* Capel, M. & M. 374.

Duties on  
coals.

Borrowing  
on credit  
of duties.

By-laws.

Sales to be  
by weight.

Selling one  
sort of coals  
for another.

men to appoint and remove officers at pleasure (*l*). The corporation may remove or enlarge the market, and for that purpose they may purchase lands and tenements (*m*). For defraying the necessary expenses of the market, the corporation are authorized to take from every master of a vessel laden with coals, cinders, or culm, arriving in the port of London to the westward of Gravesend, 1d. per ton (*n*) on the cargo. The ancient rights of the corporation to levy other duties were not to be exercised for seven years, but afterwards resumed under new regulations, to be levied and paid, or in default recovered as the Act provided (*o*). The duties are to be applied in purchasing land, and for other specified purposes, and when they shall be more than sufficient for supporting the market and paying the compensation and salaries to the clerks, and others employed in executing the Act, then the overplus of the duties are to be laid out in stock, in the names of the chamberlain, town clerk, and comptroller, to accumulate till the dividends shall be sufficient for the purposes aforesaid, and when sufficient the duties are to cease. By section 25 the corporation are empowered to borrow money upon the credit of the duties, and to make bye-laws (*p*), with reasonable penalties for the regulation of the market; but such by-laws must be approved of by one or more of the judges, and be printed and published. The chamberlain is to keep an account of the duty, and the monies borrowed on credit of it; and an account of the produce shall once in every year be laid before both Houses of Parliament. By section 43, all coals, cinders, and culm, which shall be sold from and out of any vessel in London or Westminster, or within twenty-five miles of the General Post-office, are to be sold by weight, and not by measure. By section 45, if any seller shall knowingly sell one sort of coals for another within the assigned limits, he shall pay £10 per ton, but shall not be subject to such penalty in respect of any number of tons exceeding twenty-five tons

(*l*) Sec. 5.

(*m*) Secs. 6, 7.

(*n*) Sec. 23.

(*o*) Secs. 60-64, post, p. 562.

(*p*) Secs. 33, 34.

for the same offence. By section 47 the seller shall, with every quantity of coals exceeding five hundred and sixty pounds, delivered from any lighter, &c., within the limits aforesaid, deliver a ticket in the form mentioned in the Act, under penalty of £20. This section was afterwards repealed, and a new provision substituted in its place, with a similar penalty for disregarding it, but without any provision for recovering the penalty, and it was accordingly held that no action would lie at the instance of an individual for the recovery thereof (*q*). By section 48, coals sold from any lighter, &c., or wharf, &c., within the aforesaid limits, except coals carried and delivered in bulk shall be delivered in sacks, containing one hundred and twelve pounds, or two hundred and twenty-four pounds net, but coals delivered by gang-labour may be conveyed in sacks containing any weight (*r*); and coals sold from any ship, &c., or wharf &c., within the limits aforesaid, above five hundred and sixty pounds, may be delivered in bulk, in carts, or carriages, or in any lighter, &c., if the purchasers think fit. Provided also that where such coals shall be delivered in any cart or other carriage in bulk, the weight of such cart, &c., as well as of the coals, shall be previously ascertained by a weighing machine fixed for that purpose on the wharf or place from which the coals shall be brought; and the seller's ticket shall state the weight of the cart &c., as well as of the coals, under a penalty of £50 (*s*). Every carman or driver of any cart &c., in which any coals above five hundred and sixty pounds shall be carried from any ship &c., or from any wharf, warehouse, &c., in London and Westminster, or within twenty-five miles from the Post-office, shall, if required by the purchaser, weigh the waggon or other carriage with the coals therein, in any public weighing machine for carts &c., which may be on the road to the place of delivery, and on refusal is subjected to a penalty of £10 (*s*).

Tickets on  
delivery.

Sacks.

Ships and  
carts.

Carts to be  
weighed  
with the  
coals.

In every instance, where any coals shall be delivered in

Delivery  
of less  
quantity  
than pur-  
chased.

(*q*) Meredith v. Holman, 16 M. & W. 798; 1 & 2 Vic. c. ci. ss. 2, 3, 4, post, p. 563.

(*r*) Sec. 49.

(*s*) Sec. 50.



Weighing-  
machines.

bulk to the purchaser, from any ship, &c., or from any wharf, or place within the limits aforesaid, a less quantity shall be delivered than is expressed in the ticket to be delivered therewith, the seller shall for every such offence forfeit £10; and if the deficiency shall exceed 224 pounds, £50 (*t*). Every carman or driver of any cart, &c., laden with coals for sale, or to be delivered to the purchaser by any seller, or dealer, or carrier of coals from any ship, &c., or from any wharf, &c., within the limits aforesaid, who shall not have placed in, on, or under his cart, &c., a perfect weighing-machine, in the form, size, and dimensions of the machine approved by the Lords Commissioners of Her Majesty's Treasury, and deposited at the office of the hall-keeper of the City of London, is subject to a penalty of £10; and the seller, or dealer, or carrier of such coals to a penalty of not exceeding £20; provided, nevertheless, that coals which shall be conveyed in bulk, or in any cart belonging to the purchaser of such coals, may be so conveyed without the carman being obliged to carry a weighing-machine therewith, or any person being subject or liable to any penalty in respect thereof (*u*). The carman of any cart in which coals shall have been carried in sacks for delivery to the purchaser, from any ship, &c., or from any wharf, &c., within the limits aforesaid, shall weigh, if he shall be required so to do, any one or more of the sacks contained in such cart, &c., which may be chosen by the purchaser with the coals therein, and also afterwards weigh in like manner such sack without any coals therein, under a penalty of not more than £20, or less than £5 (*v*); and if any purchaser requiring any sack of coals to be weighed as aforesaid should find the coals to be deficient in weight, and shall signify to the carman his desire to have all the coals contained in such cart, or any part of such coals, weighed or reweighed in the presence of some constable, police officer, or other indifferent person, then the carman shall remain at or before the house of the purchaser with such coals, and the cart, &c., until such coals are weighed,

Weighing  
coals and  
sacks.

(*t*) Sec. 51.

(*u*) Sec. 52.

(*v*) Secs. 54, 55; *Meredith v. Holman*, 16 M. & W. 798.

under a penalty of £20 (*w*). All coals sold in any quantity less than 560 pounds, or in the quantity of 560 pounds, within the limits, must be weighed previous to being delivered to the purchaser, and also, if required, in the presence of such purchaser, or his agent, or his servant, under a penalty on the seller of £5 (*x*). Where several sacks are sent out with deficient quantities the aggregate penalty is thereby incurred, and if the aggregate of the penalties exceed £25, an action of debt lies, and not proceedings before magistrates whose jurisdiction is limited by the 77th section of the Act to £25 (*y*). A proper machine, or proper scales and weights for weighing coals, must be kept at every watch-house or police station, or at some other place or places which shall from time to time be appointed by any two or more of Her Majesty's justices within the limits aforesaid, and be kept in repair from time to time by the overseers of the poor of the township, parish, &c., in which such watch-house, or other station shall be situate, out of the poor rates, and shall be used at any time for weighing any coals respecting which there may be any dispute; and in case the overseers of any such township, &c., shall not provide such a machine on or before the 1st January after the passing of this Act, or if such overseer shall not cause such machine to be repaired, or a new machine to be provided within seven days after notice in writing of the want of repair, he is liable to a penalty of £10 (*z*).

Weighing-machines to be kept at public places.

A certificate of the quantity of the coals, the day of loading, the name of the master of the ship, and the names of the several and respective collieries out of which the said coals were taken and wrought, and the price paid the master for every sort of coal, with other particulars, must be signed by the fitter or other person vending or delivering the coals, and registered at the Coal Exchange (*a*), under penalties mentioned in the Act (*b*).

Certificate of coals delivered.

(*w*) 56, 57.

(*x*) Sec. 58.

(*y*) Collins v. Hopwood, 15 M. & W. 459.

(*z*) Sec. 59.

(*a*) Sec. 75.

(*b*) See 6 & 7 Vic. c. 2, discontinuing certain actions; also 1 & 2 Vic. c. ci. s. 8, and 14 & 15 Vic. c. cxlvi. ss. 8-9, amending the law as to certificates and declarations by fitters.

Recovery  
and appli-  
cation of  
penalties.

All penalties not exceeding £25 are recoverable before justices of the peace, who have power to award a portion of any penalty, not exceeding one-half part thereof, to the informer, or other person assisting in apprehending the offender (*e*).

Limita-  
tions of  
actions.

All actions must be brought and tried in the county or place where the cause of action arises, and no action or suit is to be commenced against any person for anything done in pursuance of the Act, after three calendar months next after the cause of action accrues (*d*); one-half of penalties above £25 sued for and recovered in the superior courts, is to be paid to the informer or person suing for them, the other half to Her Majesty (*e*).

Patent fuel  
not liable  
to duties.

Patent fuel, an article composed of coal-dust mixed with 13 per cent. of pitch and lime, is not liable to the duties imposed upon coal under the Act of 1 & 2 Will. IV. c. lxxvi., or the continuation Acts. Wilde, C.J., said (*f*): "It is true that patent fuel is composed chiefly of coal-dust, but, in order to make it merchantable as fuel, it is necessary to mix the coal-dust with a certain quantity of pitch and lime; and, although the proportion of those ingredients are small as compared with the coal-dust, it was admitted that they were really necessary, and were not introduced for the purpose of evading the duty. And, although it may be true, as stated by the scientific witnesses examined on behalf of the plaintiffs, that there is no purpose to which ordinary pit coal can be applied to which coal-dust could not also be applied; yet it is manifest that the latter would be applied at so great a disadvantage as to be almost worthless; whereas, mixed with the pitch and lime, and having undergone the process described in the case, it becomes, for many purposes, more valuable than ordinary coal. The fact, therefore, of the coal-dust being so applicable does not, in our opinion, decide the question. In construing the Act of Parliament imposing the duty, we must assume that the word 'coals' is used in its ordinary

(*e*) Secs. 77, 79.

(*d*) Sec. 89.

(*e*) Sec. 85.

(*f*) *Mayor of London v. Parkinson*,  
10 C.B. 288.



popular sense, and must see whether the article in question comes within its meaning, according to that criterion."

The above-mentioned Act of 1 & 2 Will. IV. c. lxxvi. <sup>1 & 2 Vic. c. ci.</sup> was amended by 1 & 2 Vic. c. ci., and new provisions made with respect to the seller's ticket (*g*) to be left with the delivery of the coals; the weighing-machines (*h*) to be sent with each cart; the allowance of drawbacks (*i*); and the payment of wages; and, subject to the approval of the Board of Trade, the Corporation of London may issue by-laws for regulating vessels laden with coals.

The 3rd section of 1 & 2 Vic. c. ci. is as follows: "That, <sup>Consequences of non-delivery of a ticket.</sup> with any quantity of coals not exceeding 560 pounds delivered by any cart, waggon, or other carriage, within the cities of London and Westminster, or within twenty-five miles from the General Post Office, the seller shall deliver, or cause to be delivered to the purchaser, or to his servant or agent, immediately on the arrival of the cart, waggon, or other carriage in which such coals should be sent, and before any of such coals should be unloaded, a ticket, according to a certain form; and that, in case any such seller should not deliver or cause to be delivered such ticket as aforesaid to the purchaser of such coals, or to his agent and servant, before any part of such coals were unloaded, every such seller should for every such offence forfeit and pay any sum not exceeding £20." By the form given in the Act the ticket is required to be "signed" with the name or names of the seller or sellers, and that of the carman, in words at full length. In reference to this section it has been decided that the omission to deliver a ticket with the coals may be pleaded in bar to an action for the price of the coals sold (*j*). The principle of this decision is consistent with previous cases decided on the same class of statutes. In *Little v. Poole* (*k*), where an action was brought for the price of a quantity of coals which had been sold and delivered by the plaintiff to the defendant, it was contended that the plaintiff was not entitled to recover,

(*g*) Secs. 2-4.

(*h*) Secs. 5, 6.

(*i*) See also 20 & 21 Vic. c. lxxxix.

24 & 25 Vic. c. 42, s. 7.

(*j*) *Cundell v. Dawson*, 4 C.B. 376.

(*k*) 9 B. & C. 192.

Consequences of non-delivery of a ticket.

because a ticket had not been delivered with the coals, as required by the then existing statute 47 Geo. III. c. 58, s. 113; the various cases of *Law v. Hodson* (*l*), *Langton v. Hughes* (*m*), *Cannan v. Bryce* (*n*), and *Bensley v. Big-nold* (*o*), were cited and considered; and Lord Tenterden, in giving judgment, said: "The regulations prescribed by this Act of Parliament appear to be intended to prevent fraud in the vend and delivery of coals; and that, for that purpose it was required, that the ticket should be signed by the coal-meter; and that, as the ticket was not signed as required for that purpose, the plaintiff, the seller of the coals, was not entitled to recover." Bayley, J., said: "The case fell within the principle of *Law v. Hodson*, in which case the court held, that, the policy of the Act being to protect the buyer against the seller, it would be best effected by holding that the vendor could not recover the value of the bricks which had been delivered, such bricks having been less than the statutable size; and that the object of the Legislature in the statute then in question (the 47 Geo. III. c. 68) would also be best effected by holding that a seller of coals could not recover the value of them where he had omitted to deliver a ticket pursuant to the statute." Littledale, J., and Parke, J., recognized the same principle, and a nonsuit was accordingly entered. The judgment in *Little v. Poole* is consistent with the cases of *Marchant v. Evans* (*p*), *Rex v. the Inhabitants of Gravesend* (*q*), *Forster v. Taylor* (*r*), *Cope v. Rowlands* (*s*), and was followed in *Cundell v. Dawson* (*t*), wherein Wilde, C.J., said: "The statute of 1 & 2 Vic. c. ci. continued by 8 & 9 Vic. c. 101., has precisely the same object in view as the 47 Geo. III. c. 68, and seeks to effect it by similar means, viz. by requiring the seller to deliver to the buyer a ticket in a prescribed form."

Another case (*u*) arose under the 4th section of 1 & 2 Vic. c. ci., wherein it was decided that that section did not

(*l*) 11 East, 300.

(*m*) 1 M. & S. 593.

(*n*) 3 B. & Ald. 179.

(*o*) 5 B. & Ald. 335.

(*p*) 2 J. B. Moore, 14.

(*q*) 3 B. & Ad. 240.

(*r*) 5 B. & Ad. 887.

(*s*) 2 M. & W. 149.

(*t*) 4 C.B. 399.

(*u*) *Blanford v. Morrison*, 15 Q.B. 724.

apply when a cargo is delivered on the wharf of the purchaser directly from a coal brig in which it was supplied without the intervention of any other vessel. Parke, B., said: "We are all agreed, and need not trouble the other side; the 4th section imposes a penalty on the seller of coals if they are delivered without a proper ticket. This being a penal enactment, we must construe it strictly according to the fair import of the language, without extending it. The section, in terms, applies only to the case of a delivery by a vendor to a purchaser by 'lighter, vessel, barge, or other craft.' I agree that the word 'vessel' may denote a large or a small vessel. Its meaning must be regulated by the context. I agree also that in the former Act the word 'vessel' and other words also may include a brig. But in the 4th section of this Act, the words 'other craft' are appended to the specific words. 'Craft,' therefore, is the governing word, which is to include all the vessels previously specified. If the words had been 'ship or other craft,' then, I think, there would have been an inconsistency, and we must have rejected either one word or the other. We think that, according to the ordinary import of language, the word 'vessel,' as used in this section, must be 'craft;' and that the section does not apply where the cargo has been delivered bodily out of the vessel in which the coals were shipped at Newcastle on to the wharf of the purchaser. It is said that such a case is within the mischief contemplated; that may be; but the Legislature has not provided against it. It may have been supposed that such a provision as the 75th section of the former Act, 1 & 2 Will. IV. c. lxxvi. (v), which requires the fitter to send out a certificate of tonnage to be registered at the London coal market, would be sufficient in such a case. At all events, we think the 4th section of the present Act applies only where coals are delivered from a larger store by the intervention of craft. Probably the section would not apply where the purchaser fetches away the coals in a craft furnished by himself; but on this it is unnecessary to give any opinion."

When coals  
are de-  
livered  
direct on  
wharf of  
purchaser.



Coal  
duties  
continued  
to 1882.

By the 3 & 4 Vic. c. cxxxi. (after reciting several Acts of Parliament, viz. 5 & 6 W. & M. c. 10; 10 Geo. IV. c. 136; 11 Geo. IV. & 1 Will. IV. c. lxiv.; 1 & 2 Vic. c. ci.; and 2 & 3 Vic. c. 80), other provisions are made in reference to the coal trade; and by subsequent Acts the duties payable under the before-mentioned Acts have been continued to the 5th July, 1882 (*w*); those duties now amount together to the sum of 13d. per ton, and are extended to coals brought to London by railways (*x*) within the London district (*y*), or by any other mode of conveyance (*z*), including canals (*a*).

Coal-  
whippers  
Acts  
expired.

The Coalwhippers Acts, which by section 50 of 14 and 15 Vic. c. 78, were to remain in force till the year 1856, have not been since continued, consequently, the sale and delivery of coals, and the discharge of the vessels in the port of London, are now left under the control of the owners and masters of vessels and the purchaser.

LOCAL  
LAWS.

Local Acts have been passed for the regulation of the coal trade, and ships entering ports with coal; these must be consulted whenever any question arises affecting any particular port, but in the absence of special regulations the preceding observations relative to the coal trade generally, and the Acts relating to the port of London hereinbefore referred to, will, in numerous instances, afford assistance in the solution of disputed questions.

Brighton.

By a local Act relating to Brighton, it was enacted that there shall be paid any rate or duty which the commissioners should impose not exceeding 3s. for every chaldron of coal brought or delivered within the limits of the town, and it was held that a duty was payable in respect of each quantity of coals amounting to a chaldron brought into the town, although at different times and in several parcels, each containing a less quantity than a chaldron (*b*).

(*w*) 24 & 25 Vic. c. 42, s. 10; 26 & 27 Vic. c. 46, s. 1.

(*x*) 8 & 9 Vic. c. 101, s. 2; 14 & 15 Vic. c. cxlvi.; 24 & 25 Vic. c. 42, s. 4.

(*y*) 24 & 25 Vic. c. 42, ss. 3, 7.

(*z*) 8 & 9 Vic. c. 101, s. 2; 14 & 15 Vic. c. cxlvi. ss. 2, 18.

(*a*) 14 & 15 Vic. c. cxlvi. ss. 13, 17, 30, 35; 24 & 25 Vic. c. 42, s. 4.

(*b*) *Mills v. Funnell*, 2 B. & C. 899.

The borough of King's Lynn, in Norfolk, claimed the sole and exclusive right, by immemorial custom, of measuring all coals imported into their harbour, and since the Weights and Measures Act, 5 & 6 Will. IV. c. 63, s. 9, came into operation, of weighing the said coals, and to appoint persons for that purpose by making an entry in the corporation books of the appointment. Coal-meters were accordingly so appointed, with the privilege of retaining for their own use the sum fixed by the corporation; but in the case of *Smith v. Cartwright* it was held, that the right of the corporation by custom to measure coals imported, was not by the 5 & 6 Will. IV. c. 63 converted into a right to weigh, and that as the payment in respect of the measurement was for the benefit of the meters only, he was an officer and not a servant of the corporation, and therefore an appointment under seal would be necessary (c).

A royal commission, dated 30th August, 1836, addressed to the chief coal-owners, viewers, and custom-officers resident in or stationed in the counties of Northumberland and Durham, contains various regulations and directions respecting the measuring of coals in those districts, the registry of keels, boats, waggons, and other carriages; together with other provisions with a view of preventing frauds; but the regulations thus prescribed do not seem to be much understood in the district, or generally followed.

By charter-party it was agreed to load a vessel at Sunderland with coke with all possible despatch, in the customary manner, "in regular turn;" delay took place in the loading, and in an action for damages consequent upon such delay, evidence was tendered that, according to the custom of the port of Sunderland under such a contract, the shipowner was bound to wait till a manufacturer of coke, not named in the contract, had supplied all ships (whose names were put down in a turn-book kept by the manufacturer) which he had previously contracted to load with coke in the port, provided he used reasonable despatch; but such evidence was held to be inadmissible, although it was shown that the manufacturer's name was mentioned at the time the contract was made. It was

King's  
Lynn.

Northum-  
berland  
and  
Durham.

Meaning of  
"loading  
in turn."

nevertheless held that evidence might be given to explain the meaning of "regular turn" (*d*).

Newcastle-  
upon-Tyne.

By 8 & 9 Vic. c. lxxiii. commissioners and other officers are appointed (*e*) for the regulation of the coal trade of the Newcastle district, but nothing therein contained is to be deemed or construed to prevent the provisions of any Act which might be thereafter passed for the general regulation of the coal trade from applying to the port of Newcastle and the coal trade therein (*f*). The Act is to continue in force for twenty-one years.

Coals sent from Newcastle to London were liable to a port duty according to the Newcastle chaldron (*g*).

Ireland.

By 2 Will. IV. c. 21, several previous Acts, so far as they imposed restrictions upon the coal trade in *Ireland*, were repealed, and other regulations made in reference thereto.

(*d*) *Hudson v. Clementson*, 25 L.J. C.P. 234.

(*e*) Secs. 1, 10.

(*f*) Sec. 48.

(*g*) *Linskill v. Read*, 2 Peake's N.P. Cas. 68.



## CHAPTER XXI.

## CIVIL REMEDIES.

## SECTION I.

## COMMON LAW.

EJECTMENT.

USE AND OCCUPATION.

TROVER.

TRESPASS.

CASE.

## EQUITY.

EQUITABLE RELIEF.

BILL FOR AN ACCOUNT.

FORECLOSURE SUITS.

REDEMPTION SUITS.

RECEIVERS AND MANAGERS.

INSPECTION OF ADJOINING MINES.

INJUNCTIONS.

## SECTION II.

MASTERS AND WORKMEN.

## COMMON LAW.

THE Common Law Procedure Acts, 1852 and 1854, though they introduce extensive changes in the practice of the courts, do not contain any provision for the abolition of the forms of action previously in use; but inasmuch as by those Acts several causes of action may be joined together, the distinction which formerly existed between one form of action and another, has, to a certain extent, diminished in importance.

Statute of  
limitations.

In mining matters, the cause of action accrues when the actual damage was, or might have been, by reasonable diligence, discovered; so that the Statute of Limitations would only begin to run from the period at which the injury might have been discovered; and it was ruled by Mr. Justice Willes, in *Bonomi v. Backhouse*, overruling *Niekin v. Williams* (*a*), that any other construction of the statute which would deprive a man of redress when he might be in invincible ignorance of the damage, would be harsh, and contrary to ordinary principles of law (*b*).

Ejectment.

Ejectment, lies for the recovery of the possession of a mine; and also for tin bounds, not, however, by the name of "bounds," but of a "mine" (*c*). When ejectment lies, and there are liberties, easements, or other incorporeal rights appurtenant to the mine and enjoyed therewith, they may be recovered with the mine (*d*).

The legal owner of the fee and all other persons with limited legal interests may bring ejectment, but a person claiming under a license only, if out of possession, cannot maintain the action (*e*). One of several joint tenants who has been ousted by his companions may also maintain the action (*f*). Ejectment cannot be brought by the lord of the manor for the recovery of mines situate in the lands of the copyhold tenants, because, in the absence of custom, the property only in the minerals is vested in the lord, whilst the legal possession of them is in the tenant (*g*); and it is doubtful whether ejectment will lie for an unopened mine in any lands, freehold or copyhold, when the title to the mine is distinct from that of the surface (*h*).

(*a*) 10 Ex. 259.

(*b*) Ante, pp. 154, 334, 499; *Denys v. Shuckburgh*, 4 You. & C. 42; *Emmott v. Mitchell*, 14 Sim. 432; *Chasemore v. Richards*, 7 H.L. Ca. 349; *Bonomi v. Backhouse*, 28 L.J. Ex. 335.

(*c*) *Harebottle v. Placock*, Cro. Jac. 21; *Comyn v. Kyneto*, ib. 150; *Andrews v. Whittingham*, Carth. 277; 1 Salk. 255; *Crocker v. Fothergill*, 2 B. & Ald. 660; *Jones v. Reynolds*, 11 Ad. & Ell. 808; *Vice v. Thomas*, Smirke's Rep. 35; *Earl of Falmouth v. Alderson*, 1 M. & W. 210; *Rogers*

*v. Brenton*, 10 Q.B. 53; ante, pp. 365, 373.

(*d*) *Crocker v. Fothergill*, 2 B. & Ald. 661.

(*e*) *Doe d. Hanley v. Wood*, 2 B. & Ald. 724; *Daniel v. Gracie*, 6 Q.B. 145.

(*f*) *Co. Litt.* 199<sup>b</sup>; *Cubitt v. Porter*, 8 B. & C. 268; *Stedman v. Smith*, 26 L.J. Q.B. 314.

(*g*) Ante, p. 172.

(*h*) *Sayer v. Pierce*, 1 Ves. Senr. 234; *Wilkinson v. Proud*, 11 M. & W. 33, 37.

An action for use and occupation can be maintained on an agreement for a lease to work veins of minerals, when any act has been done to constitute possession, such as beginning to explore the ground, or making preparations for commencing operations (*i*). Use and occupation.

Trover lies for the wrongful removal of all ores severed from the soil (*j*), and a licensee may maintain the action (*k*); but every wrongful removal which deprives a person of the possession of his property is not necessarily such a conversion of the property as will amount to trover (*l*). Trover.

If in possession, the owner of a mine may maintain trespass; if out of possession, an action on the case is generally the proper remedy for all kinds of injury to the property; in some instances there is an election between trespass and case (*m*). Case generally lies for and in lieu of the action of waste (*n*), and may be maintained for any kind of waste, notwithstanding that the injuries sustained constitute a breach of an express covenant (*o*). The remedy does not die with the person who committed the trespass, but will lie against the executor or administrator of a deceased person, both for injuries committed by the deceased during his life, as well as for those injuries which have been continued by his legal representatives (*p*). The various questions which we have discussed respecting injuries to mining property will generally form the subject of either one or the other of these forms of action, and in most instances of both (*q*). Trespass and Case.

When the lateral adjacent or subjacent support to lands has been withdrawn through mining operations, a right of action accrues to the injured party; unless the proprietor of the soil has lost his right to support under one or other of the circumstances before referred to (*r*). Ignorance of Withdrawal of support to lands by mining.

(*i*) *Jones v. Reynolds*, 7 C. & P. 335; 4 Ad. & Ell. 805.

(*j*) *Rowe v. Brenton*, 8 B. & C. 737; ante, p. 176.

(*k*) *Northam v. Bowden*, 24 L.J. Ex. 257; ante, p. 311.

(*l*) *Thorogood v. Robinson*, 6 Q.B. 769.

(*m*) *Muskett v. Hill*, 5 Bing. N.C. 694; *Cubitt v. Porter*, 8 B. & C. 268; *Marker v. Kenrick*, 13 C.B. 188.

(*n*) Ante, p. 259.

(*o*) *Marker v. Kenrick*, 13 C.B. 188.

(*p*) *Powell v. Rees*, 7 Ad. & Ell. 426; 8 L.J. N.S. Q.B. 47.

(*q*) Ante, pp. 176, 253, 261.

(*r*) Ante, pp. 337, 440, 455, 469, 472, 476.



the limits will be no excuse for a trespass upon another's rights, unless the trespasser was misled by the party seeking redress (*s*). No course of action arises merely in consequence of the omission to fill up excavations or apertures wrongfully made (*t*).

Amount of  
damages.

In estimating the amount of damages, the full value of the severed minerals will be allowed without any deduction for the expenses incurred in severing them, or for rent payable to the mine-owner; but the expenses of removing the minerals and bringing them to the pit's mouth may be deducted (*u*).

Water.

Any interference with the right of another, to the use of water, whether in its natural or artificial state (*v*), is actionable (*w*), even though no actual damage may have ensued (*x*); and if the water is diverted so as materially to lessen the application of it to the estates or property of an owner above or below, an action also lies, unless a prescriptive right to divert the water can be established (*y*); and an action can be maintained for its defilement or pollution (*z*). A distinction has been drawn between natural and artificial waters, and it has been laid down in effect that what would be damage to a natural stream may be no damage to an artificial one, and that the mode of determining the right of parties to artificial water must depend upon the manner and object for which they were acquired (*a*). But the most important questions generally arise respecting subterranean waters, and the respective rights of owners of adjoining mines to the use of them (*b*); and here it is material to observe, that it is doubtful whether a claim to underground waters can be acquired by prescription or custom (*c*).

Inunda-  
tions.

Inundations caused by the flowing of water from one

(*s*) Atty.-Genl. *v.* Fullerton, 2 Ves. & B. 263.

(*t*) *Firmstone v. Wheeley*, 13 L.J. Ex. 361; *Clegg v. Dearden*, 12 Q.B. 601.

(*u*) *Martin v. Porter*, 5 M. & W. 351; *Morgan v. Powell*, 8 Q.B. 278; 11 L.J. Q.B. 263; *Wild v. Holt*, 11 L.J. Ex. 285; 9 M. & W. 161, 672.

(*v*) Ante, p. 484, 504.

(*w*) Ante, p. 492, 493.

(*x*) Ante, p. 488, 493.

(*y*) Ante, p. 327, 489, 492, 505.

(*z*) Ante, p. 494.

(*a*) Ante, p. 504.

(*b*) Ante, p. 496.

(*c*) Ante, p. 503.

mine into another, consequent on the breaking of barriers, Barriers. are of frequent occurrence; and in all such cases, the onus of proving a right to have the barrier maintained, generally devolves upon the injured party (*d*). In the case of *Smith v. Kenrick*, it was contended that the owner of one mine was of common right bound to prevent the water coming into his own mine from flowing into his neighbour's; but *Cresswell, J. (e)*, held the contrary, and decided that it would rather seem to be the right of each of the owners of the adjoining mines, neither being subject to any servitude to the other, to work his own mine in the manner most convenient to himself, although the natural consequence be, that some prejudice might accrue to the adjoining owner, so long as there was no negligence or malicious intent. But the courts of equity always did, and the courts of law will now also, restrain the owner of one mine from inflicting unnecessary injury to his neighbours; and all anticipated encroachments will be prevented (*f*).

The privileges which have been accorded to miners, in Ways. the use of roads and ways, as well as way-leases, have often been the cause of litigation (*g*), both as regards the particular meaning to be attached to the reservations of such right when instituted by deed (*h*), as well as to the right itself when sought to be established by custom or prescription (*i*). Wherever the right exists, the infringement of it is the subject of an action, but it will be often difficult to determine what acts amount to an infringement of the right. Anything done which materially injures the mine, or prevents free access to it, is actionable, and will be restrained both at law and in equity. The right to "ways of necessity" ceases, when there is no longer any occasion for the use of them (*j*).

(*d*) Ante, p. 438.

(*e*) 18 L.J. C.P. 172; see also *Chadwick v. Trower*, 8 Scott 1; 6 B. N.C. 1; ante, p. 502.

(*f*) Ante, pp. 253, 261; and post, p. 576.

(*g*) Ante, p. 506.

(*h*) Ante, p. 510.

(*i*) Ante, p. 327, 508.

(*j*) Ante, p. 513.

## EQUITY.

Equitable  
relief.

We have pointed out numerous instances where equity has interfered to prevent a wrong ; and if it be remembered that mining property is of a very fluctuating nature, and that one of the most useful branches of the jurisdiction of the courts of equity is to afford instant relief, it will be seen how applicable the remedies in equity are, to all kinds of anticipated or actual injuries to mines or mining interests.

Contracts.

A contract for the purchase of any interest in a mine should be carried into effect with the least possible delay ; time is the essence of the contract, and the intended purchaser may therefore fix a peremptory day for completion, and on the contractor making default, may rescind the contract, or apply to equity to enforce it, and pending proceedings, protect the property (*k*). The Court of Chancery will act with unwonted vigour in such a case. If after a lease is granted to work mines, and the lessee delays working the mine, equity will interfere (*l*).

Deeds.

The construction of mining deeds forms an important branch of mining law, and it appears from the numerous cases discussed in this work how frequently equity is resorted to in such cases. Even a devise of minerals requires more than ordinary care, and has occasioned the necessity of equity construing the intention of the parties. Formerly, equity would not try the right to a mine (*m*), but now, whenever any question of title arises out of proceedings in Chancery, that court must try the question, and has no power to remit it to the common law courts (*n*).

Bill for an  
account.

A bill in equity may be filed for an account of the profits and loss of a mine in certain cases, and under certain circumstances, because it is a species of trade (*o*), but it is doubtful whether the court will lend its aid to this

(*k*) *Macbryde v. Weekes*, 22 Beav. 533.

(*l*) *Green v. Sparrow*, cited in 3 Sivanst, 408.

(*m*) *Vice v. Thomas*, 4 Y. & C. 538; *Sayer v. Pierce*, 1 Ves. Senr. 232.

(*n*) *Copeland v. Webb*, 1 N.R. 119.

(*o*) *B. of Winchester v. Knight*, 1 P.W. 406; *Whitfield v. Bewit*, 2 P.W. 240; *Jesus Coll. v. Bloome*, 3 Atk. 262; *Pulteney v. Warren*, 6 Ves. 89; *Norway v. Rowe*, 19 Ves. 144; *Hood v. Easton*, 2 Giff. 692; ante, p. 230.



mode of proceeding on the part of one or more of several owners, if the partnership affairs can be wound up under the Joint Stock Companies Acts; and it will be even more reluctant still to interfere between partners in mines carrying on business within the counties of Cornwall and Devon on the Cost Book principle, as in those cases full and ample justice may be generally attained by a resort to the court of the Stannaries (*p*). The difficulties also of proceeding in equity for an account in an unregistered mining company will be apparent, when it is remembered, that in an ordinary suit of this nature, all those who are or have been partners, and are to be affected by the proceedings, should be before the court.

Bill for an account.

Whenever this remedy is resorted to, the bill should be filed as soon as the necessity for the account arises, as unnecessary delay will prejudice the application to the court (*q*).

As a rule, the account will be decreed, either independently of relief respecting the corpus of the land, or as incident or collateral to it (*r*).

A bill for an account may be filed, among other reasons, for preventing a multiplicity of actions, but not to award damages only or to give relief attainable at law (*s*).

When an account is decreed, the proper officer of the court, who takes the account, must allow all the reasonable expenses incurred in the management of the partnership affairs (*t*).

A bill for an account will also be sustained by the owners or lessees of a mine against their agent (*u*); by a mortgagor of mines against his mortgagee (*v*); by a mortgagee who is also a partner against his co-partner (*w*); by

(*p*) 18 & 19 Vic. c. 32. See 25 & 26 Vic. c. 89.

(*q*) Parrott v. Palmer, 3 My. & K. 632.

(*r*) Bishop of Winchester v. Knight; Pulteney v. Warren; Parrott v. Palmer, *suprà*.

(*s*) Bishop v. Church, 2 Ves. Senr. 104; Yates v. Hambly, 2 Atk. 362; Smith v. Cooke, 3 Atk. 381; Sayer v. Pierce, 1 Ves. Senr. 282.

(*t*) Scott v. Nesbitt, 14 Ves. 445.

(*u*) Crease v. Penprase, 1 Jur. 840, 2 You. & C. 527.

(*v*) Hughes v. Williams, 12 Ves. 493; Rowe v. Wood, 2 Jac. & W. 559; Norton v. Cooper, 25 L.J. Ch. 121; Millett v. Davey, 32 L.J. Ch. 122.

(*w*) Rowe v. Wood, *suprà*.

a lessor against a lessee as a trustee for other persons (*x*); by a mortgagor against the owners of adjoining property (*y*); by an infant on his coming of age against his guardians (*z*).

Statute of  
limitation.

Where, by underground working, the defendant had wrongfully taken the coal of his neighbour, the court limited the account to six years, but intimated an opinion that the onus probandi rested upon the wrong-doer to show that any coal which was proved to have been wrongfully abstracted was so abstracted within the six years; and that in cases of fraud, as where ships had been taken to conceal the wrongful act, the accounts would not be limited to any period (*a*).

Foreclosure  
and re-  
demption  
suits.

The peculiar nature of mining property, gives additional importance to proceedings in equity instituted by mortgagors or mortgagees; and we have already referred to several questions recently decided on the respective rights of these parties in foreclosure and redemption suits (*b*). It is only necessary further to observe that wherever equity is resorted to, the fluctuating nature of mining property will influence the court very considerably in the exercise of its jurisdiction.

Receivers  
and  
managers.

A receiver or manager of mines will be appointed at the instance of one of several owners, on the ground that the subject-matter is a species of trade, and not a mere tenancy in common in land (*c*), but not against a mortgagee in possession for omitting to incur unnecessary expenses, although it might be a beneficial expenditure (*d*). These and other similar questions will be found in another part of the work (*e*).

Inspection  
of adjoining  
mines.

If the owner of a mine has reason to suspect that the owner of an adjoining mine is encroaching on his rights,

(*x*) *Clavering v. Westly*; *Clavering v. Reed*, 3 P. W. 402.

(*y*) *Hood v. Easton*, 2 Giff. 692; ante, p. 231.

(*z*) *Mulhallen v. Marum*, 3 Dru. & W. 337.

(*a*) *Dean v. Thwaite*, 21 Beav. 621; *Hood v. Easton*, *supra*; and ante, p. 230.

(*b*) Ante, p. 231.

(*c*) *Holmes v. Bell*, 2 Beav. 298; *Jefferys v. Smith*, 1 Jac. & W. 298; *Goodman v. Whitcombe*, 1 Jac. & W. 689; *Crawshay v. Maule*, 1 Swanst. 495; *Wilson v. Greenwood*, 1 Swanst. 471; *Smith v. Jeyes*, 4 Beav. 503.

(*d*) *Rowe v. Wood*, 2 Jac. & W. 555.

(*e*) Ante, p. 230.

he may obtain an order for inspection under the 58th section of the Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125), or from a court of equity; and the court which grants such inspection, may order the removal of all obstructions with a view to such inspection being effectually made; and, if necessary, to direct the making of drift-ways, or any other act which the Government inspector of the district may report can be done without any practical difficulty or danger to the lives or health of the workmen, or probability of detriment to the present or future workings of the mine so to be inspected, beyond a temporary inconvenience, such as suspension of the works. And the court may also order,—that the owner of the mine to be inspected, shall give all reasonable facilities for access to the mine, and for the ventilation thereof during such inspection (*f*).

Formerly, the courts of equity had exclusive jurisdiction in the granting of injunctions, but now, whenever any proceedings are pending in a court of law, the judges of those courts have generally concurrent jurisdiction with the courts of equity in the granting of injunctions (*g*). Injunctions.

It is only in cases of urgent necessity that the injunction is granted, and whenever the necessity does exist, the parties seeking relief must be very prompt in making the application to the court, as any delay is not only an argument against the urgency, but is generally fatal to the application (*h*); but delay in cases of waste is not so prejudicial to the application, as in other cases where injunctions are applied for (*i*). The effect of delay.

(*f*) *Atty.-Genl. v. Chambers*, 12 Beav. 159; Notes to the case of the *East India Co. v. Kynaston*, 3 Bligh, O.S. 153, 168; *Ennor v. Barwell*, 6 Jur. N.S. 1233; *Bennitt v. Whitehouse*, 29 L.J. Ch. 326; *Bennett v. Griffiths*, 30 L.J. Q.B. 98; *Whaley v. Brancker*, 10 L.T. N.S. 155; ante, p. 289.

(*g*) 15 & 16 Vic. c. 76, sec. 226; 17 & 18 Vic. c. 125, secs. 79-82; 25 & 26 Vic. c. 79, sec. 6; *ib.* c. 89, sec. 85.

(*h*) *Lowther v. Stamper*, 3 Atk.

496; *Clavering v. Clavering*, 2 P. Wms. 388; *Grey v. Duke of Northumberland*, 13 Ves. 236; 17 Ves. 282; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515; *Norway v. Rowe*, 19 Ves. 143; *Field v. Beaumont*, 1 Swanst. 204; *Clowes v. Beck*, 20 L.J. Ch. 505; *Clegg v. Edmondson*, 3 Jur. N.S. 299; *Williams v. St. George's Harbour Co.* 2 De G. & J. 547; *Davies v. Marshall*, 4 L.T. N.S. 105.

(*i*) *Atty.-Genl. v. Eastlake*, 11 Hare, 205.



Injunctions.

Negligence in a plaintiff will also frequently deprive him of his right to an injunction (*j*).

Formerly, it was doubted whether an injunction could be granted to restrain the use of a legal right, but it seems now to have been decided that a legal right improperly or inequitably exercised may be restrained (*k*), especially as against persons with limited interests (*l*).

We have shown that an injunction will be granted to prevent any anticipated injury to mines; and even when the title is disputed, if delay would be likely to cause permanent injury, the injunction will be granted without waiting for any decision on the issue concerning the right (*m*); on the other hand, injunctions will be granted to prevent the working of mines to the injury of adjoining mine proprietors or the detriment of the rights of others on the surface or in adjacent lands (*n*), and either at the instance of those in possession or in reversion. But the courts of equity show great reluctance to grant injunctions *ex parte*, or where the right to the injunction depends upon any undecided pending point of law, and even before the equities of the suit have been determined (*o*).

Waste.

Injunctions have always been granted to restrain all kinds of waste (*p*). The principle upon which the court of equity has acted in restraining waste by persons with limited interests, has been stated to be analogous to a breach of trust (*q*), but that view of the doctrine of waste has lately met with disapproval (*r*).

Trespass.

Injunctions have also for some time been granted in cases of trespass (*s*), but there must be a much stronger case

(*j*) *Johnson v. Wyatt*, 11 W. R. 852.

(*k*) *Buckland v. Gibbins*, 11 W. R. 483.

(*l*) *Thomas v. Oakley*, 18 Ves. 184.

(*m*) *Ante*, pp. 253, 261.

(*n*) *Ante*, p. 455; *Hunt v. Peake*, 29 L.J. Ch. 786; *Whaley v. Brancker*, 10 L.T. N.S. 155.

(*o*) *Ante*, pp. 259, 261.

(*p*) *Ante*, pp. 157, 253; *Farrant v. Lovel*, 3 Atk. 723; *Lord Norbury v. Alleyne*, 1 Dr. & Walsh, 337;

*Keogh v. Collins, Kay & J.* 805; *Kemp v. Sober*, 1 Sim. N.S. 520; 19 L.T. 308; *Neale v. Cripps*, 4 K. & J. 472; *Elwell v. Crowther*, 31 L.J. Ch. 765; *Bagot v. Bagot*, 32 L.J. Ch. 116.

(*q*) *Ormonde v. Kynersley*, 5 Mad. 369; 7 L.J. Ch. 150; 8 L.J. Ch. 67.

(*r*) *Kingham v. Lee*, 15 Sim. 399; *Powys v. Blagrove, Kay*, 501; 4 De G. M. & G. 448.

(*s*) *Mitchell v. Dors*, 6 Ves. 147; *Earl Cowper v. Baker*, 17 Ves. 128; *Player v. Roberts*, Sir W. Jones, 248.

to justify the interference of the court in cases of trespass than in those relating to waste (*t*).

Injunctions have been granted to restrain the taking of precious stones (*u*); to prevent a tenant and strangers from digging for minerals (*v*); from removing mineral substances deposited by a stream (*w*); at the instance of the lord of a manor to protect his rights after a sale of land with a reservation of the minerals (*x*); from destroying fences (*y*); to protect the legal rights of a riparian proprietor to the flow or purity of a stream, whether natural or artificial (*z*); to prevent water from flowing into the mine of another (*a*); against diverting water (*b*); from conveying coals by means of an underground tramway (*c*); from destroying or injuring a colliery way-leave (*d*); to prevent the breach of a covenant, where the construction of the covenant is free from ambiguity (*e*).

Injunctions.

The court will be very cautious in granting injunctions to restrain the working of mines in active operation (*f*).

When mines are in active operation.

(*t*) *Elmhirst v. Spencer*, 2 Mac. & G. 45; *McCurdy v. Noak*, 17 L.J. Ch. 166.

(*u*) *Earl Cowper v. Baker*, 17 Ves. 128; *Whaley v. Brancker*, 10 L.T. N.S. 155.

(*v*) *Flamang's case*, cited 6 Ves. 147; 7 Ves. 308; 15 Ves. 138; *Emmott v. Mitchell*, 14 Sim. 432; *Earl Lonsdale v. Curwen*, 3 Bli. 168; *Grey v. Duke of Northumberland*, 17 Ves. 281; *Haigh v. Jaggar*, 2 Coll. 231; *Earl Cowper v. Baker*, 17 Ves. 128; *Thomas v. Oakley*, 18 Ves. 184; *Clowes v. Beck*, 13 Beav. 347; *Powell v. Aiken*, 4 K. & J. 343.

(*w*) *Thomas v. Jones*, 1 Y. & C.C.C. 526.

(*x*) *Grey v. Duke of Northumberland*, 13 Ves. 236; 17 Ves. 281; *Bourne v. Taylor*, 10 East, 189; *Lewis v. Branthwaite*, 2 B. & Ad. 437; *Whitechurch v. Holworthy*, 19 Ves. 213; *Hilton v. Lord Granville*, 5 Q.B. 701; *Bowser v. Maclean*, 2 De G. F. & J. 415.

(*y*) *Pratt v. Brett*, 2 Mad. 62.

(*z*) *Wood v. Sutcliffe*, 2 Sim. N.S. 163; *Clowes v. Beck*, 13 Beav. 347; *McSwiney v. Haynes*, 1 Ir. Eq. 322; *Peter v. Daniel*, 5 C.B. 568; *Oldaker v. Hunt*, 6 De G. M. & G. 376; *Atty-Genl. v. Borough of Birmingham*, 4 Kay & J. 528; *Bidder v. Croydon*, 6 L.T. N.S. 778; *Ennor v. Barwell*, 2 Giff. 410; *Hodgkinson v. Ennor*, 32 L.J. Q.B. 231.

(*a*) *Duke of Beaufort v. Morris*, 6 Hare, 340.

(*b*) *Elmhirst v. Spencer*, 2 Mac. & G. 45; *Whaley v. Brancker*, 10 L.T. N.S. 155.

(*c*) *Bowser v. Maclean*, 6 Jur. N.S. 1220; see also *Pollard v. Clayton*, 1 K. & J. 462.

(*d*) *Newmarch v. Brandling*, 3 Swanst. 99.

(*e*) *Tipping v. Eckersley*, 2 K. & J. 264.

(*f*) *Grey v. Duke of Northumberland*, 13 Ves. 236; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515; *Field v. Beaumont*, 1 Swanst. 208.

## MASTERS AND WORKMEN.

*When labourers' Contracts are within Statute of Frauds. Contracts for an indefinite time—notice to determine service.*

*APPRENTICE v. MASTER, for neglect, want of instruction, or proper maintenance.*

*WORKMAN v. MASTER, for an injury caused by negligence—when the workmen contribute to the misfortune—when a competent foreman is engaged—when accident occurs through another servant—when fellow-worker is a partner—a volunteer worker. Statutory liability—Lord Campbell's Act. 23 & 24 Vic. c. 151; 25 & 26 Vic. c. 79—neglect of general and special rules—Injunctions. Fences.*

*MASTER'S LIABILITY TO STRANGERS, for the acts of his workmen—unlawful acts—when a contractor is employed—fraud of workmen.*

*MASTER v. STRANGERS, for loss of services of workmen—for harbouring workmen—for procuring breach of contract.*

*Drowning Coal-pits and Mines.*

Statute of  
Frauds.

Workmen's  
contracts.

CERTAIN contracts entered into between a master and his workman, whether in reference to mining or any other occupation, must be in writing, as will appear by reference to the Statute of Frauds (*a*). In mining contracts there should be inserted a provision in case of accidents or checks in trade which might cause unavoidable interruption in the works; such as:—inundations,—falling in of shafts or pits,—freezing of canals,—as it is probable that the employer, under those and similar circumstances, would in the absence of any agreement to the contrary, be bound to pay the employed for the period when it would be impossible to work (*b*). Whether such contracts be oral or written, we have already pointed out the summary proceedings before justices for the regulation of the conduct of masters and workmen, the recovery of wages, and the punishment of misdemeanors (*c*). We now proceed to show that the workman or apprentice, independently of such summary proceedings, has a common law right of action against his master in respect of all contracts whatsoever. If a workman, not being a domestic servant, enters into a contract of service for an indefinite time, the

(*a*) Ante, p. 268.

(*b*) Reg. v. Lord, 17 L.J. M.C.

181; ex parte Bailey, 23 L.J. M.C.

161; Whittle v. Frankland, 2 B. &

S. 19.

(*c*) See ante, p. 537.



law presumes a yearly hiring (*d*) ; but such a presumption may be varied by evidence of usage to the contrary (*e*) ; but if not so varied, and the workman misconducts himself and is discharged during the year, or voluntarily quits his employment during the year, in either case he is not entitled to any wages for that year (*f*).

In all cases of yearly hiring, some doubts have been entertained respecting the mode of determining such engagements, but the law would now seem to be settled on this point by deciding that such services shall end with the current year upon a reasonable notice to quit (*g*). Reasonable notice is generally understood to be a three months' notice ; but if the judge, on the trial of a cause, leaves the jury to decide the question—whether the service was to last till the end of the current year and be determined by a three months' notice, or how otherwise—the court will not disturb the verdict on the ground either of misdirection, or that it is an inflexible rule that, except with menial servants, a general hiring was a hiring for a year (*h*). Cases, therefore, will frequently arise, where the length of service and the notice necessary to determine it must depend upon the nature of the work contracted to be performed and the usage applicable to such cases (*i*).

Notice to  
determine  
service.

The length of notice generally tallies with the length of service or time between the pay-days ; in South Wales, a month's notice is generally understood ; in the North of England, where the pay is usually every fortnight (*j*), a fortnight's notice is required ; and in Cornwall, the length of notice depends entirely upon the nature of the employment. Apart from the arrangements of particular districts, labourers, miners, and workmen, are generally engaged by the week or month, and in such cases, a notice equal to the length of service is required.

(*d*) *Lilley v. Elwin*, 11 Q.B. 742 ;  
*Fawcett v. Cash*, 5 B. & Ad. 904.

(*e*) *Baxter v. Nurse*, 6 M. & G. 935.

(*f*) *Huttman v. Boulnois*, 2 C. & P.  
510 ; *Lilley v. Elwin*, 11 Q.B. 742 ;  
*Ridgway v. Hungerford Market Co.*  
3 A. & E. 171 ; *Horton v. McMurtry*,  
29 L.J. Ex. 260.

(*g*) *Williams v. Byrne*, 7 A. & E.  
177 ; *Todd v. Kerrich*, 8 Ex. 151.

(*h*) *Fairman v. Oakford*, 29 L.J.  
Ex. 459.

(*i*) *Nowlan v. Ablett*, 2 C. M. & R.  
54.

(*j*) *Whittle v. Frankland*, 31 L.J.  
M.C. 81.

Apprentice  
v. master.

An apprentice has a right of action against his master to enforce a covenant for his instruction and maintenance, even though the apprentice may misconduct himself (*k*); and this would even appear to be the law, although the apprentice's conduct amounted to gross negligence and even dishonesty (*l*).

If the master ill-treats his apprentice, the latter, notwithstanding anything to the contrary contained in his indenture of apprenticeship, will be justified in deserting his master (*m*).

Workman  
v. master.

A master who employs a servant, is bound to take all reasonable precautions for the safety of that servant, more especially if the work is, like mining, of a dangerous character; and the law of Scotland on this point is the same as the English law; if, therefore, from any negligence of the master an injury is sustained by the workman, the master is liable to an action for damages. It would be

Master's  
liability for  
negligence.

gross negligence not to inform the workmen of concealed dangers known to the employer (*n*), or if the master is present and personally superintends the work (*o*); but the master's liability does not extend to injuries caused by third parties (*p*), or where the workman could judge as well if not better than the master of the precautions

Workmen's  
conduct.

necessary to be taken for the prevention of accidents (*q*); and the master's responsibility ceases when the accident occurs in consequence of the negligence of the workman himself, or by his disregarding the rules prescribed for his safety (*r*). Indeed, no action will lie for the recovery of damages where the party complaining, has by his own want of due care and caution, in any way contributed to the accident (*s*); but there is a distinction to

(*k*) *Winstone v. Linn*, 1 B. & C. 469-70.

(*l*) *Philps v. Clift*, 28 L.J. Ex. 153.

(*m*) *Edward v. Trevellick*, 4 Ell. & B. 69-70.

(*n*) *Paterson v. Wallace*, 1 Macqueen, 748; *Bartonshill Coal Co. v. Reid*, 3 Macq. 295; *Roberts v. Smith*, 26 L.J. Ex. 319; *Ashworth v. Stanwix*, 30 L.J. Q.B. 183.

(*o*) *Roberts v. Smith*, 26 L.J. Ex. 319.

(*p*) *Alsop v. Yates*, 27 L.J. Ex. 156.

(*q*) *Seymour v. Maddox*, 16 Q.B. Rep. 330; *Couch v. Steel*, 3 Ellis & B. 402.

(*r*) *Senior v. Ward*, 28 L.J. Q.B. 139.

(*s*) *Witherley v. Regent's Canal Co.* 12 C.B. N.S. 2.

be drawn when the action is founded in tort and not in contract (*t*).

In *Brydon v. Stuart* (*u*), it was decided that the owner of a mine was bound to exercise ordinary care and vigilance in keeping the shaft of a mine and the machinery and tackle for lifting people from it and lowering them into it, in a secure and sound condition; in that case, the widow of a man who was killed in being drawn up out of the shaft, sued for and recovered damages under Lord Campbell's Act. The man was being drawn up at his own request, and on his refusal to work on account of alleged defects in the lining and ventilation of the pit; but the Lord Chancellor held, that even if the refusal to work was unlawful, the master was liable. "Whatever," said his lordship, "the man does in the course of his master's employ, according to the fair interpretation of the words *eundo, morando, redeundo*, the master is responsible, and it does not make any difference that the workmen had no lawful excuse or proper cause for leaving their work. If they had said wrongfully, 'We will not work any more, we will terminate our contract; now take us up again;' it was the duty of the master to take them up safely, as to have brought them down safely. The master who lets them down is bound to bring them up, even if they come for their own business, and not for his. He is answerable for the state of his tackle, which in this instance was defective, and his obligation continues even after the men have ceased to work in his employ, and while they are causing themselves to be removed from it."

Master's liability for negligence.

Refusal to work.

The master is not liable when he employs a competent foreman to superintend the works, and gives him instructions to examine the plant, machinery, and tackle, to see that it is fit for use (*v*). The same principle was upheld in a judgment of Chief Justice Shaw in *America* (*w*).

When competent foreman engaged.

The mere relation of master and servant does not

(*t*) *Martin v. Great Northern Ry.* 16 C.B. 179; *Waite v. North-Eastern Ry. Co.* 27 L.J. Q.B. 417; 28 L.J. Q.B. 258.

(*u*) 2 Macq. 34.

(*v*) *Ormond v. Holland*, Ell. B. & Ellis, 102.

(*w*) See 3 Macq. 316.



Extraor-  
dinary  
risks.

raise an implied contract on the part of the master, to take due and ordinary care, not to expose the servant to extraordinary danger and risk in the course of his employment (*x*).

Negligence  
of fellow-  
workman.

If one servant suffers for the wrongful act or carelessness of another servant, the master will not be responsible if he took ordinary precautions to have proper servants and machinery for the conduct of the work (*y*); as a rule, indeed, a servant has no right of action against his master for injury done to him in the course of his employ by the acts of his fellow-servant; and if killed, no action under the 9 & 10 Vic. c. 23 can be maintained by his representatives (*z*). For instance, where the plaintiff, was with other workmen in the employ of the defendant, engaged in sinking a pit, and was at the bottom of the pit assisting in filling a tub with water, which was drawn up to the top to be emptied, and through something occurring at the top where his fellow-workmen were employed, it fell down on the plaintiff and injured him, the master was held not to be liable (*a*). But the master's liability attaches unless the servants are engaged in the same common employment, and engaged in the same work under that common employment (*b*); where, therefore, servants are engaged in different departments of duty, an injury committed by one servant upon another, will make the master liable (*c*). Some nicety, and even difficulty, in particular cases will occasionally arise, but by keeping in view the few leading principles here laid down, the liability of the master can generally be ascertained without much difficulty.

When fel-  
low-work-  
man is a  
partner.

If a servant sustains an injury from his fellow-servant, who is also one of the proprietors, such fellow-servant

(*x*) *Riley v. Baxendale*, 30 L.J. Ex. 87.

(*y*) *Priestley v. Fowler*, 3 M. & W. 1; *Wiggett v. Fox*, 11 Ex. 833; *Hutchinson v. Newcastle, Y. & B. Ry. Co.* 5 Ex. 343; *Degg v. Midland Ry. Co.* 1 H. & N. 773; *Wigmore v. Jay*, 5 Ex. 354; *Bartonshill Coal Co. v. Reid*, 3 Macq. 284, 288, 307; *Tarrant v. Webb*, 25 L.J. C.P. 261; *Searle v. Lindsay*, 31 L.J. C.P. 106.

(*z*) *Vose v. Lancashire & Y. Ry. Co.* 27 L.J. Ex. 249; *Searle v. Lindsay*, 31 L.J. C.P. 106.

(*a*) *Griffiths v. Gidlow*, 27 L.J. Ex. 404.

(*b*) *Walter v. South-Eastern Ry. Co.* 32 L.J. Ex. 209.

(*c*) *Potter v. Faulkner*, 31 L.J. Q.B. 30; *Bartonshill Coal Co. v. McGuire*, 3 Macq. 307.

would be liable in his character of master, and being liable, the partners of such fellow-worker in the same concern, are also liable (*d*).

If a person volunteers to assist a servant in his work, and whilst so employed, sustains an injury by the negligence or carelessness of another servant, the master would not be liable (*e*). A volunteer worker.

The representatives of a deceased person have a right of action under Lord Campbell's Act, 9 & 10 Vic. c. 93, where the deceased loses his life through the negligence or carelessness of other servants of the master not in the same common employment; but there is no such right of action unless the deceased himself could have brought such action for injuries sustained if death had not ensued (*f*). Such action must be brought by the representatives within twelve calendar months after the death; and it has been held that legal liability alone is not the test in respect of which damages can be recovered, but that there must have been a reasonable expectation of pecuniary advantage to the surviving relatives from the deceased had he survived (*g*). The surviving relatives are not entitled to any damages in respect of funeral expenses or mournings (*g*). Statutory liability.

Notwithstanding the penalties which are imposed by the before-mentioned Act of 23 & 24 Vic. c. 151 (*h*) against the owner or agent of a mine for acting contrary to the provisions of that statute, every servant who sustains injury in consequence of the neglect of such owner or agent to comply with the provisions of that statute, has a right of action for special damage sustained by such injury. The penalties annexed to the offence by the statute do not take away the common law right of action (*i*). 23 & 24  
Vic. c. 151.

By the 23 & 24 Vic. c. 151 general rules are provided

(*d*) *Ashworth v. Stanwix*, 30 L.J. 93; *Paterson v. Wallace*, 1 Macq. Q.B. 188. 748; *Dalton v. South E. Ry. Co.* 27

(*e*) *Degg, admx. v. Midland Ry. Co.* 1 H. & N. 773; *Potter v. Faulkner*, L.J. C.P. 227; *Duckworth v. Johnson*, 29 L.J. Ex. 25.

31 L.J. Q.B. 30.

(*h*) Ante, pp. 547-549.

(*f*) See also *Senior v. Ward*, 28 L.J. Q.B. 139.

(*i*) *Couch v. Steel*, 3 Ell. & B. 409.

(*g*) *Blake v. Mi. Ry. Co.* 18 Q.B.

Neglect of  
general  
rules.

to be observed in every coal mine, colliery, or ironstone mine, by the owner or agent thereof, and penalties are imposed on such owners and agents if the said rules have not been established, or, if established, not kept in good preservation; therefore any servant who sustains injury in consequence of the owner or agent disregarding these provisions, is entitled to bring an action against his master for damages; and it was held in the case of *Mellors v. Shaw (j)*, that there was a statutory duty imposed on the owner of a mine to act strictly in accordance with those rules. In that case the defendants were owners of a coal mine, and the plaintiff was employed to descend a shaft and to work therein. The shaft was not made secure, and a stone fell upon the head of the plaintiff, whereby he was dangerously wounded, and it was held that the defendant had not securely cased or lined the shaft according to Rule 4 of 18 & 19 Vic. c. 108. That rule is similar to the rules subsequently provided by the 23 & 24 Vic. c. 151 (*k*).

Neglect of  
special  
rules.

The liability of an owner in a coal mine, where special rules are framed and approved of under the 18 & 19 Vic. c. 108, for injuries sustained by his workmen, was decided in the case of *Senior v. Ward*; there the plaintiff was employed to descend the shaft of a coal-pit in a cage by a rope. The rope broke, and the labourers were killed. By one of the rules, before any one descended the shaft, the cage was to be run up and down the shaft, in order to test the sufficiency of the rope and tackling; this rule had been habitually neglected for many weeks, and the court held that the defendant was liable for his negligence in not complying with the rule; but in that case the plaintiff himself had been cautioned that the rope was not safe, and that the rule for testing the rope had been habitually violated, and it was therefore held that the plaintiff, who had himself materially contributed to the accident, was deprived of any remedy—*volenti non fit injuria (l)*.

(j) 30 L.J. Q.B. 333.

(k) Ante, p. 547.

(l) 28 L.J. Q.B. 139.



The 25 & 26 Vic. c. 79, s. 6, gives power to superior courts of law and equity to enforce by injunction compliance with the Act, without prejudice, however, to any other remedy permitted by law for enforcing the provisions of that Act. Injunctions.

When machinery is required by statute to be kept properly fenced, there is not only a cause of action against every person on whom such a duty was imposed, for every injury sustained through his neglect, but a servant who entered into service under such circumstances does so, in the reasonable expectation that the statute will be obeyed, and accordingly, if he sustains personal injury from neglect of his master, without any fault of his own, the master is liable; in such a case there is an implied contract to protect the servant (*m*). Fences.

It is a general principle that a man is civilly liable, not only for his own acts, but for the acts of others committed by his authority, "*qui facit per alium facit per se*." A master, therefore, is liable for any wrongful or careless act committed by his servant or apprentice, and the authority of the master will frequently be inferred either from the nature of the act or the circumstances under which the servant may have been placed by his master at the time of the commission of the act (*n*). But the servant cannot, without special authority for that purpose, appoint another person to act in his stead, the maxim of law being, "*delegatus non potest delegare*" (*o*). If, then, a servant is employed by his master to do a lawful act, the master is liable in trespass for any damage done to another through the negligence of the servants whilst so employed, but not so if the act is unlawful (*p*); Master's liability to strangers,  
for the acts of his workmen.

(*m*) *Holmes v. Clarke*, 30 L.J. Ex. 135. thick, 9 Ves. 251; *Blore v. Sutton*, 3 Meriv. 237.

(*n*) *Gordon v. Rolt*, 4 Ex. 365; (*p*) *Lyons v. Martin*, 8 A. & E. 512; *Jarmain v. Hooper*, 6 M. & G. 827.

(*o*) 9 Rep. 772; *Coles v. Treco-*

Unlawful acts.

Master's  
liability  
for the  
acts of his  
workmen.

therefore, where the master is present and sees his servant commit an act which is immediately injurious to another, the master's liability is complete—the act of the servant then becomes the act of the master (*q*). But a master is not liable, in trespass, for any injury done without his knowledge by his servant, though in the course of his employ (*r*). But the master is liable for such an injury, in an action on the case (*s*). And if the master orders his servant to do an act, the natural consequence being to oblige the servant to commit a trespass; or if the servant, in carrying into execution his master's orders, uses ordinary care, and an injury is done to another, the master is still liable in trespass as well as in case (*t*). But if the injury arises from the want of ordinary care in the servant, the master will be liable in case only (*u*).

When a  
contractor  
is em-  
ployed.

If a person employs a contractor to execute work, the contractor, and not the person who employed the contractor, is liable for the negligence of the workmen (*v*); but where the mischief arises directly from the act ordered to be done, there the person giving the order is responsible, and he cannot avoid responsibility by entering into a contract with some one else to perform the work. Where, however, the act complained of is purely collateral, and arises incidentally out of the performance of the work, you cannot make the principal liable, but only the contractor, as the relationship of master and servant can only in such a case be established between such contractor and the workman, and not between the principal and the workman (*w*).

Fraud of  
workmen.

A master is not liable for the wilful fraud or negligence of his servant, even although it may have been done or suffered

(*q*) *Chandler v. Broughton*, 1 Cr. & M. 29; *McLaughlin v. Pryor*, 4 M. & G. 48; *Roberts v. Smith*, 26 L.J. Ex. 319.

(*r*) *Gordon v. Rolt*, 4 Ex. 365.

(*s*) *Sharrod v. the London and North-Western Ry. Co.* 4 Ex. 580; 7 Dowling & L. 213.

(*t*) *Ante*, p. 503.

(*u*) *Gregory v. Piper*, 9 Cress. 591.

(*v*) *Rapson v. Cubitt*, 9 M. & W. 710; *Allen v. Hayward*, 7 Q.B. 960; *Peachey v. Rowland & Anr.* 13 C.B. 182; *Gayford v. Nicholls*, 9 Ex. 702; *Launcester v. Greaves*, 9 B. & C. 628.

(*w*) *Ellis v. the Sheffield Gas Consumers' Co.* 2 Ell. & B. 767; *Hole v. the Sittingbourne & S. Ry. Co.* 30 L.J. Ex. 81.

in the course of, or in relation to the service, unless the master afterwards adopts the act or negligence for his own use and benefit. The question in all such cases to be decided is this: Could it fairly be presumed that the servant (who can only be regarded as the agent) was acting within the scope of the duties assigned to him by virtue of his appointment; if such an inference cannot be drawn, fraud may reasonably be presumed (*x*). Subject to the foregoing observations, a master is liable to a stranger for any wrongful or careless act committed by his servant, whereby such stranger is injured, because the master is bound to guarantee the public against such acts (*y*); à fortiori, if the servant was acting for his master's benefit, and not for any purpose of furthering his own interest, or for any motive of his own caprice or inclination (*z*); but the master is not liable to such stranger, if the stranger volunteers to assist a servant in his work, and does give such assistance without the master's authority or consent (*a*). Fraud of workmen.

A master may bring an action against a stranger for beating or maiming his servant on the ground of loss of services (*b*). The service and loss of service must be proved, but it is not necessary to prove an actual contract, or that wages have been paid; the slightest evidence of service, such as milking cows, or making tea, has been held sufficient (*c*); and even a right to the service has been held to be sufficient without express proof of service (*d*); and Master may sue strangers for loss of service.

(*x*) *Story on Agency*, 416; *McManus v. Crickett*, 1 East, 106; *Grant v. Norway*, 10 C.B. 665; *Hubbersty v. Ward*, 8 Exch. 330; *Coleman v. Riches*, 16 C.B. 104.

(*y*) *Bartonshill Coal Co. v. Reid*, 3 Macq. 283; *Bartonshill Coal Co. v. McGuire*, 3 Macqueen, 300-6.

(*z*) *Limpus v. London G. O. Co.* 32 L.J. Ex. 34.

(*a*) *Degg v. Midland Ry. Co.* 1 H. & N. 773; *Potter v. Faulkner*, 31 L.J. Q.B. 30.

(*b*) *Hall v. Hollander*, 4 B. & C. 660.

(*c*) *Bennett v. Allcott*, 2 T.R. 166; *Carr v. Clarke*, 2 Chitty's Rep. 261.

(*d*) *Reg. v. Chillesford*, 4 B. & C. 102.



Master  
may sue  
strangers

for har-  
bouring  
workmen,

for pro-  
curing  
breach of  
contract.

where a married woman is separated from her husband and living with her father as his servant, the father may maintain the action (*e*). The relationship of master and servant must, however, be shown to be a real genuine service; and where, therefore, a person is only occasionally employed, no action will lie (*f*). A master is also entitled to an action against a stranger who harbours his apprentice or servant, even after the desertion of the apprentice; and in such a case the master may waive the tort and bring assumpsit against a stranger for the work and labour of his apprentice (*g*); but the new master would not be liable to such an action if he did not know that the apprentice had deserted, or unless he afterwards refused to restore such apprentice or servant upon request (*h*). A master can also maintain an action against a stranger for causing or procuring his servant to leave him, or to break his contract, whether the employment has actually commenced or is only *in fieri*, and even although the strict relationship of master and servant was not subsisting (*i*).

Drowning  
coal-pits  
and mines.

By the 13th Geo. II. c. 21, treble damages may be sued for and recovered by action of debt against any person who shall unlawfully, wilfully, and maliciously divert or cause to be diverted (*j*), water from any river, brook, water-course (*k*), channel, or land flood, or convey or cause to be conveyed water into any coal-work, mine, pit, or delph of coal, or into any subterraneous cavities or passages (*l*), or make or cause

(*e*) Harper v. Luffkin, 7 B. & C. 387.

(*f*) Thompson v. Ross, 29 L.J. Ex. 1.

(*g*) Foster v. Stewart, 3 M. & S. 191.

(*h*) Blake v. Lanyon, 6 T.R. 221.

(*i*) Lumley v. Gye, 2 Ell. & B. 216.

(*j*) Ante, p. 492.

(*k*) Ante, p. 484.

(*l*) Ante, p. 496.

to be made any subterraneous cavities or passages with an intention to damage such property ; and a similar right of action is given against any person who shall destroy or obstruct any sough or sewer (which had been a sough or sewer in common for fifty years) made for draining any coal-work, mine, pit, or delph of coal, or who shall attempt or continue any such mischievous practice, or should aid or assist therein in manner aforesaid ; but the Act does not apply to the owners of any such sough, drain, or sewer.

## CHAPTER XXII.

PLEADINGS IN ACTIONS RELATING TO MINES, MINERALS,  
AND QUARRIES.

## BARRIERS.

For removing barriers whereby water flows into a mine.

*Firmstone v. Wheelley*, 2 D. & L. 203; *Shaw v. Stenton*, 27 L.J. Ex. 253; *Williamson v. Baird*, 10 Jur. N.S. 154; ante, pp. 438, 503; post, "Trespass," p. 598.

## CANALS.

Declaration for compensation to owners of mines under a canal, the working whereof, the canal company prevented, and pleas.

*Swindell v. Birmingham Canal Company*, 9 C.B. N.S. 241; *Reg. v. Aire & Calder Navigation Company*, 30 L.J. Q.B. 337.

## COAL MINE.

Averting right to.

*Midgley v. Richardson*, 14 M. & W. 608.

## COAL TRADE.

Plea, alleging an omission to deliver a ticket on delivery of the coals, in contravention of the 1 & 2 Will. IV. c. lxxvi.

*Meredith v. Holman*, 16 M. & W. 798; ante, p. 559.

## COMMONS.

Disturbing surface and digging up the soil.

2 & 3 Will. IV. c. 71, s. 1; *Carr v. Foster*, 3 Q.B. 581; *Ricketts v. Salwey*, 2 B. & Ald. 360; ante, p. 188.



**Plea of a right to dig for minerals.**

*Paddock v. Forrester*, 3 M. & G. 903; *Clayton v. Corby*, 2 Q.B. 813.

**Customary right to dig coals.**

*Anglesey v. Hatherton*, 10 M. & W. 218; *Wilkinson v. Proud*, 11 M. & W. 33.

**To take sand and marl.**

*Blewett v. Tregonning*, 3 Ad. & Ell. 554; *Glover v. Dixon*, 9 Ex. 158; ante, p. 328.

**Plea of a prescriptive right to search for minerals.**

1 Wms. Saund. 345 (2); 2 & 3 Will. IV. c. 71, ss. 1, 5.

**Schedule B. 47, Common Law Procedure Act, 1852.**

*Blackett v. Bradley*, ante, p. 189.

**CONDITION PRECEDENT.****How to be pleaded.**

*Friar v. Grey*, 15 Q.B. 891; and see 5 Ex. 584.

**CORNISH CUSTOMS.**

Plea of a local custom to throw away sand and rubble raised in the working of a mine, into a natural stream.

*Carlyon v. Lovering*, 26 L.J. Ex. 251; ante, pp. 340, 379.

**COST BOOK SYSTEM**

Must be pleaded in order to give the party relying upon it the benefit of the custom.

Ante, pp. 340, 379.

**COVENANTS.**

Declaration on a covenant in a lease to pay a certain sum for fixed and tonnage rents, with pleas and replication.

*Perry v. Attwood*, 25 L.J. Q.B. 408; ante, p. 296.

**Equitable plea.**

*Mines R. Societies v. Magnay*, 10 Ex. 489.

**CROWN.**

Pleading right to work mines by custom against the crown.

Ante, pp. 96, 404, 487.

**CUSTOMS.****Illegal custom.**

*Broadbent v. Wilkes*, ante, p. 329.

Averring right to search for minerals generally.

*Paddock v. Forrester*, 3 M. & G. 903; 2 & 3 Will. IV. c. 71, s. 5.

To search for minerals in the lands of another.

*Hilton v. Lord Granville*, 5 Q.B. 703; ante, pp. 327, 331;  
*Rogers v. Brenton*, 10 Q.B. 26; *Constable v. Nicholson*, 14 C.B. N.S. 230; ante, p. 328.

Declaration, for throwing sand and rubbish into a stream and polluting it. Pleas of a prescriptive right to do so.

*Carlyon v. Lovering*, 26 L.J. Ex. 251; ante, pp. 327, 333.

Plea of a right to raise coals.

*Anglesey v. Hatherton*, 10 M. & W. 218; *Wilkinson v. Proud*, 11 M. & W. 33.

To search for and take sand and marl.

*Blewett v. Tregonning*, ante, p. 327; *Glover v. Dixon*, 9 Ex. 158.

## EASEMENT.

A declaration as well as a plea should aver the extent of the right.

*Midgley v. Richardson*, 14 M. & W. 608; ante, p. 508.

Count against a lessee of an easement on land.

*Martyn v. Williams*, 1 H. & N. 817; ante, p. 440; *Peyton v. Mayor of London*, ante, p. 457.

## FENCES.

Count for not repairing a fence.

*Rooth v. Wilson*, 1 B. & Ald. 59; *Roberts v. Great Western Railway Company*, 27 L.J. C.P. 266; ante, pp. 212, 265.

For not fencing shafts to a mine.

*Sybray v. White*, 1 M. & W. 435.

For not fencing quarries.

*Hounsell v. Smith*, ante, p. 263.

Plea justifying a trespass to remove fences under a prescriptive right may be sustained.

2 & 3 Will. IV. c. 71, s. 5; ante, pp. 212, 265.

## FIXTURES.

Count for preventing a lessee from removing fixtures, there being a clause in the lease which allowed a reasonable time after the expiration thereof, for the removal.

*Stansfield v. Portsmouth*, ante, p. 321.

Count for depriving the owner of fixtures, such as machinery, machines, &c., and subsequent pleadings.

*London & W. L. & D. Co. v. Drake*, 28 L.J. C.P. 297.

### FOREIGN JUDGMENT.

How to be pleaded.

*Frayes v. Worms*, ante, p. 65; *Munroe v. Pilkington*, ante, p. 66.

### LEASE.

To be pleaded as a deed.

*Rollason v. Leon*, 7 H. & N. 73.

### LICENSE.

For conversion of ores, sand, and gravel, raised under a license.

*Northam v. Bowden*, 11 Ex. 70.

### MASTERS AND WORKMEN.

Count against a master for injuries sustained by the workmen in the course of his employment.

*Scott v. Mayor of Manchester*, 1 H. & N. 59; *Williams v. Clough*, 27 L.J. Ex. 325.

For allowing the servant to work in a mine where there was a dangerous shaft.

*Mellors v. Shaw*, 1 B. & S. 437.

For allowing machinery to be in a dangerous state.

*Griffiths v. Gidlow*, 27 L. J. Ex. 404; *Senior v. Ward*, 28 L.J. Q.B. 139; *Ashworth v. Stanwix*, 30 L.J. Q.B. 133.

For wages due to the labourer. The common count for work and labour is sufficient.

*Grafton v. Armitage*, 2 C.B. 336.

For inducing a workman or an apprentice to leave his master's employ.

*Hartley v. Cummings*, 5 C.B. 247; *Cox v. Muncey*, 6 C.B. N.S. 375.

For harbouring a servant or apprentice.

*Sykes v. Dixon*, 9 Ad. & Ell. 693.

Plea that plaintiff and defendant were engaged in the same common employment.

*Wiggett v. Fox*, 25 L.J. Ex. 188; *Griffiths v. Gidlow*, 27 L.J. Ex. 404.

Plea that the foreman employed by the defendant was a competent person.

*Hutchinson v. York, Newcastle, & B. Ry.* 5 Ex. 343.



Plea that plaintiff was voluntarily assisting in the work.

*Degg v. Midland Railway Company*, 1 H. & N. 773.

Pleas justifying a dismissal on the ground of misconduct on the part of a workman.

*Amor v. Fearon*, 9 Ad. & Ell. 548.

### MINERALS.

For the use of veins and minerals.

*Jones v. Reynolds*, 4 Ad. & Ell. 805.

### MINES.

For breaking and entering a coal mine and taking and carrying away the coals.

*Morgan v. Powell*, 3 Q.B. 278; *Brain v. Harris*, 10 Ex. 908.

### NUISANCE.

For making trenches or pits whereby personal damage ensued.

*Sadler v. Henlock*, 4 Ell. & B. 571; *Hardcastle v. South Y. Ry.* 4 H. & N. 67.

### PRESCRIPTIVE RIGHTS.

Prescriptive rights, under 2 & 3 Will. 4, c. 71, s. 5, should be pleaded according to the fact.

*Welcome v. Upton*, 5 M. & W. 398; *Holford v. Hankinson*, 5 Q.B. 584.

Plea alleging a right to work mines and quarries which amounts to a destruction of the subject-matter, is bad.

*Hilton v. Granville*, 5 Q.B. 701; *Blackett v. Bradley*, 31 L.J. Q.B. 65; ante, p. 451.

### RAILWAYS.

Count against a railway company for compensation for minerals, the removal of which by the owner being likely to damage the works of the company.

*Fletcher v. Great Western Railway*, ante, p. 201.

For not repairing fences.

*Ricketts v. East & West India Docks Company*, 12 C.B. 160; *Bessant v. Great Western Railway*, 8 C.B. N.S. 368; *Elliott v. North-Eastern Railway Company*, ante, pp. 196, 476, 478.

For water flowing along a railway cutting and perco-

lating through the bed of the railway into the mines beneath.

*Bagnall v. London & North-Western Railway Company*, 31 L.J. Ex. 129.

#### SHAFTS.

For not properly fencing a shaft.

*Sybray v. White*, 1 M. & W. 435.

#### SHARES IN A MINE.

For not re-delivering foreign mining shares deposited by way of loan, after payment of the loan.

*Owen v. Routh*, 14 C.B. 327; ante, p. 314.

Upon an implied indemnity against future calls.

*Walker v. Bartlett*, 17 C.B. 446.

#### SHARES.

For non-registry of shares, whereby they became forfeited.

*Catchpole v. Ambergate Railway Company*, 1 Ell. & B. 111; ante, p. 314.

Mandamus to register shares.

*Copeland v. North-Eastern Railway Company*, 6 Ell. & B. 277.

#### STATUTE OF LIMITATIONS.

How and when to be pleaded.

*Smith v. Lloyd*, ante, p. 155; *McDonnell v. McKinty*, ante, p. 156.

#### SUPPORT TO BUILDINGS.

Declaration bad unless it states the grounds upon which a house is entitled to the support of the lands.

*Hilton v. Whitehead*, 12 Q.B. 734; ante, p. 472.

Declaration for digging, carelessly, negligently, unskillfully, and improperly.

*Dodd v. Holme*, 1 Ad. & Ell. 493; ante, p. 457; *Stroyan v. Knowles*, 6 H. & N. 454.

For taking away support to buildings.

*Langford v. Woods*, 7 M. & G. 625; *Brown v. Windsor*, 1 C. & J. 20; *Hide v. Thornborough*, 2 C. & K. 250; *Wyatt v. Harrison*, ante, p. 472; *Solomon v. Vintners' Company*, 28 L.J. Ex. 370; *Hunt v. Peake*, 29 L.J. Ch. 785.

#### SUPPORT TO LANDS.

Declaration for carelessly, negligently, and improperly digging and working for minerals, whereby

the support to the surface is withdrawn. Pleas of a reservation of mines by deed.

*Harris v. Ryding*; ante, p. 459; *Stroyan v. Knowles*, 6 H. & N. 454.

For taking away subjacent support in the course of mining.

*Humphries v. Brogden*, 12 Q.B. 743; *Smart v. Morton*, 24 L.J. Q.B. 260; *Adams v. Lloyd*, 27 L.J. Ex. 499; *Bonomi v. Backhouse*, 27 L.J. Q.B. 378; 28 L.J. Q.B. 378; *Elliott v. North-Eastern Ry. Co.*; ante, pp. 469, 478.

For taking away adjacent and subjacent support.

*Nicklin v. Williams*, ante, p. 570; *Rogers v. Taylor*, ante, p. 466; *Richards v. Rose*, 9 Ex. 218; *Browne v. Robins*, 28 L.J. Ex. 250; ante, p. 468.

## TENANTS IN COMMON.

Action (*inter se*).

Ante, p. 169; *Cresswell v. Hedges*, 31 L.J. Ex. 497.

## TIN BOUNDING.

Right to bound tin, pleaded in

*Reg. v. Crease*, 11 Ad. & Ell. 677; ante, p. 367; *Crease v. Sawle*, 2 Q.B. 862; *Doe d. Earl Falmouth v. Alderson*, ante, p. 367; *R. v. Paynter*, 7 Q.B. 273; *Vice v. Thomas*, ante, p. 369; *Rogers v. Brenton*, ante, pp. 347, 365, 370.

## TRESPASS.

For breaking into and entering a mine and carrying away the minerals.

*Morgan v. Powell*, 3 Q.B. 278; *Brain v. Harris*, 10 Ex. 908.

For removing barriers of coal.

*Firmstone v. Wheeley*, 2 D. & L. 203; *Shaw v. Stenton*, 27 L.J. Ex. 253.

A plea justifying the pulling down of premises in which persons are residing, not good, without alleging notice to remove the nuisance.

*Perry v. Fitzhowe*, 8 Q.B. 757, 764; *Davies v. Williams*, 16 Q.B. 555.

Plea justifying trespass under a grant to take minerals.

*Roberts v. Davey*, 4 B. & Ad. 664; *Lewis v. Branthwaite*, 2 B. & Ad. 437; ante, p. 175.

Justifying under a prescriptive title to mines and quarries, the right to dig and raise minerals through the quarries.

*Dand v. Kingscote*, 6 M. & W. 174; *Rogers v. Taylor*, 26 L.J. Ex. 203.



**TROVER.**

Count for conversion of the soil taken and carried away.

*Higgon v. Mortimer*, 6 C. & P. 616; *Player v. Roberts*, ante, pp. 173, 176; *Burroughes v. Bayne*, 29 L.J. Ex. 185.

For conversion of the minerals.

*Rowe v. Brenton*, ante, p. 176.

For conversion of sand and gravel mixed with ores.

*Northam v. Bowden*, 11 Ex. 70.

**WASTE.**

Declaration for allowing premises which defendant was bound to keep in repair to fall into decay.

*Jones v. Hill*, 7 Taunt. 392; ante, p. 253.

For cutting down, damaging, and destroying trees.

*Martin v. Gilham*, 7 A. & E. 540.

For digging for minerals.

Ante, pp. 159, 176, 253.

Voluntary Waste.

Ante, p. 253; *Kinlyside v. Thornton*, 2 Wm. Bl. 1111; *Young v. Spencer*, 10 B. & C. 145; *Huntley v. Russell*, ante, p. 256.

Permissive waste,—does not always lie against a lessee.

Ante, pp. 159, 167; *Herne v. Bembow*, 4 Taunt. 764; *Gibson v. Wells*, 1 Bos. & Pul. N.R. 290.

**WATER-COURSES.**

For the use of a stream of water.

*Davis v. Morgan*, 4 B. & C. 8; ante, p. 484.

For injury to the plaintiff's natural right to the flow of water.

*Hall v. Swift*, 4 Bing. N.C. 381; *Northam v. Hurley*, 1 Ell. & B. 665; *Insole v. James*, 1 H. & N. 243.

Declaration alleging a right to underground springs and water-courses; pleas traversing the right.

*Acton v. Blundell*, 12 M. & W. 347; ante, p. 496.

For diminishing the force of a stream.

*Blagrove v. Bristol Waterworks Company*, 1 H. & N. 369.

For polluting water.

*Murgatroyd v. Robinson*, 7 Ell. & B. 391; *Hipkins v. Birmingham Gas Company*, 30 L.J. Ex. 60.

Count averring right to irrigate water.

*Northam v. Hurley*, 1 Ell. & B. 665; ante, p. 494.

Damages from water flowing along a railway cutting and percolating through the bed of the rails into the mines beneath.

*Bagnall v. London & North-Western Railway Company*, 7 H. & N. 423.

For removing barriers, whereby water flows into a mine.

*Williamson v. Baird*, ante, p. 592.

Plea of a right to discharge noxious water into a stream.

*Wright v. Williams*, 1 M. & W. 77; *Moore v. Webb*, 1 C.B. N.S. 673; *Carlyon v. Lovering*, 26 L.J. Ex. 251.

Pleas of a prescriptive right to water for certain specified purposes.

*Ward v. Robins*, 15 M. & W. 237; *Sampson v. Hoddinott*, 1 C.B. N.S. 590.

## WAYS.

Alleging a right to a way, and for obstructing the way, with pleas.

*South Metropolitan Cemetery Company v. Eden*, 16 C.B. 42; *Benge v. Swaine*, 15 C.B. 784; *Worthington v. Gimson*, 29 L.J. Q.B. 116.

## WAYS AND WAY-LEAVES.

Plea of a reservation of a way and of the right to grant a way-leave.

*Durham & S. Railway Company v. Walker*, 2 Q.B. 940; ante, p. 506.

## WORKING MINES.

Declaration and pleas for wrongfully and negligently working mines, whereby the soil gave way and injured the erections thereon.

*Stroyan v. Knowles*, 6 H. & N. 454; *Hunt v. Peake*, 29 L.J. Ch. 785.

## CHAPTER XXIII.

## CRIMINAL OFFENCES.

*Special provisions relating to mines.*

24 & 25 Vic. c. 96—*stealing ores—concealing ores—breaking into buildings—apprehending offenders.*

24 & 25 Vic. c. 97—*Injuries to fences—setting fire to a coal mine—attempting to set fire to any mine—setting fire to buildings—conveying water into a mine, damaging shafts, engines, waggon-ways, &c.—riotously destroying and injuring mines, buildings, engines, &c.—apprehending offenders.*

24 & 25 Vic. c. 100—*Masters and workmen, ill-treatment—neglect in providing necessities.*

*Ireland and Scotland.*

*Manslaughter,—by explosion of fire-damp,—falling of trucks into shafts,—for delegating an improper person to superintend mining works.*

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THE Criminal Law generally extends to all offences committed in and about any mine, as well as to all persons employed and engaged in mining pursuits; but there are some special provisions relating to mines, which we propose to consider.

The following provisions are contained in the Larceny Consolidation Act: "Whosoever shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal, or cannel coal, from any mine, bed, or vein thereof respectively, he shall be guilty of felony, and being convicted thereof liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement" (a).

24 & 25  
Vic. c. 96.  
Stealing  
ores, &c.

(a) Sec. 38; see similar clause in 7 & 8 Geo. IV. c. 29, sec. 37; 9 Geo. IV. c. 56, sec. 30.



Concealing  
ores, re-  
moving  
them.

“Whosoever being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement” (b).

Breaking  
into build-  
ings.

“Whosoever shall break and enter any building, and commit any felony therein, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, or being in any such building shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement” (c).

Appre-  
hending  
offenders.

“Any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this Act, except only the offence of angling in the daytime, may be immediately apprehended without a warrant, by any person, and forthwith taken, together with such property, if any, before some neighbouring justice of the peace to be dealt with according to law; and if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that *any person* has in his possession or on his premises any property whatsoever on or with respect to which any offence, punishable either upon indictment or upon summary conviction by virtue of this Act, shall have been committed, the justice may grant a warrant to search for such property as in the case of stolen goods; and any person to whom any property

(b) Sec. 39; similar clause in 2 & 3 Vic. c. 58; *Reg. v. Trevenen*, 2 M. & N. 476.

(c) Sec. 55; similar clause in 7 & 8 Geo. IV. c. 29, sec. 14, and in the Irish Act, 9 Geo. IV. c. 55, sec. 14.

shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorized, and, if in his power, is required to apprehend and forthwith to take before a justice of the peace the party offering the same, together with such property, to be dealt with according to law" (*d*). The words "any person" extend the clause to every person; but the former enactments were confined to owners of property, their servants, and peace officers. It would have been better if power had been given to enable any person to apprehend another in whose possession stolen property was found; but it is feared that the law remains the same on that subject as before the passing of the 24 & 25 Vic. c. 96 (*e*).

Apprehending offenders.

And the powers of constables to arrest without warrant for offences committed against the Act is provided for by the 104th section, which is as follows: "Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this Act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law" (*f*).

The following offences are provided for by the statute respecting malicious injuries to property. Malice need not be proved (*g*):

24 & 25  
Vic. c. 97.

"Whosoever shall unlawfully and maliciously cut, break, throw down, or in anywise destroy any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof respectively, shall, on conviction thereof before a justice of the peace, for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding £5 as to the justice shall seem meet; and whoso-

Injuries to fences.

(*d*) Sec. 103; and see similar clause in 7 & 8 Geo. IV. c. 29, sec. 63; 8 & 9 Vic. c. 47, sec. 5; and 14 & 15 Vic. c. 92, secs. 3, 5.

638; Fox v. Gaunt, 3 B. & Ad. 798.

(*f*) Similar clause in 9 & 10 Vic. c. 25, sec. 13.

(*e*) Beckwith v. Philby, 6 B. & C.

(*g*) R. v. Foster, 4 Cox's C.C. 25.

ever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common jail or house of correction, there to be kept to hard labour for such term not exceeding twelve months, as the convicting justice shall think fit" (h).

Setting fire  
to a coal  
mine.

"Whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, anthracite, or other mineral fuel, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping" (i).

Attempting  
to set fire to  
any mine.

"Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any mine, under such circumstances that if the mine were thereby set fire to, the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping" (j).

Setting fire  
to build-  
ings.

Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this Act before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with

(h) Sec. 25; see 7 & 8 Geo. IV. c. 30, sec. 23; also 14 & 15 Vic. c. 92, sec. 3; ante, pp. 212, 263, 594.

(i) Sec. 26; 7 Will. IV. & 1 Vic. c. 89, sec. 9; and 9 & 10 Vic. c. 25, sec. 9.

(j) Sec. 27; 9 & 10 Vic. c. 25, sec. 7.



or without whipping. This clause will include every building not falling within any of the previous sections of the Act; and all those buildings which, not being within the curtilage of a dwelling-house, and not falling within any term previously mentioned, were unprotected before this Act passed. The term "building" is no doubt very indefinite, but it was used in the 9 & 10 Vic. c. 25, s. 1; and it was thought much better to use that term alone, and leave it to be interpreted as occasion might require.

"Whosoever shall unlawfully and maliciously cause any water to be conveyed or run into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall with the like intent unlawfully and maliciously pull down, fill up, or obstruct, or damage with intent to destroy, obstruct, or render useless, any air-way, water-way, drain, pit, level, or shaft of or belonging to any mine, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping: Provided that this provision shall not extend to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working" (*k*).

Conveying  
water into  
a mine, da-  
maging  
shafts, &c.

"Whosoever shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy, or render useless, any steam-engine or other engine for sinking, draining, ventilating, or working, or for in anywise assisting in sinking, draining, ventilating, or working any mine, or any appliance or apparatus in connexion with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any

Damaging  
engines,  
waggon-  
way, &c.

(*k*) Sec. 28; 7 & 8 Geo. IV. c. 30, Reg. v. Foster, 4 Cox's C.C. 25; ante, sec. 6, and 9 Geo. IV. c. 56, sec. 7 pp. 484, 590.  
(*l*); Reg. v. Norris, 9 C. & P. 241;

mine, whether such engine, staith, building, erection, bridge, waggon-way, or trunk be completed or in an unfinished state, or shall unlawfully and maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof, or shall unlawfully and maliciously wholly or partially cut through, sever, break, or unfasten, or damage with intent to destroy or render useless, any rope, chain, or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway, or other way, or other work whatsoever, in anywise belonging or appertaining to or connected with or employed in any mine or the working or business thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping" (1).

Riotously  
destroying  
buildings,  
engines, &c.

"If any persons violently and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, or pull down, or destroy, or begin to demolish, pull down, or destroy, any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, or fold, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any building other than such as are in this section before-mentioned belonging to the Queen; or any machinery, whether fixed or moveable, prepared for or employed in any manufacture or in any branch thereof, or any steam-engine, or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for con-

(1) Sec. 29; 7 & 8 Geo. IV. c. 30. 23 & 24 Vic. c. 29, sec. 1; Reg. v. sec. 7; 9 Geo. IV. c. 56, sec. 8, and Whittingham, 9 C. & P. 234.

veying minerals from any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement" (*m*).

"If any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force injure or damage any stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, waggon-way, or trunk, as is in the last preceding section mentioned, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, provided, that if upon the trial of any person for any felony in the last preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence in this section mentioned, then the jury may find him guilty thereof, and he may be punished accordingly" (*n*).

Riotously  
injuring  
mines,  
engines, &c.

This clause is intended to provide both for cases where there is no sufficient evidence of an intention to proceed to the total demolition of the house, &c., and also for cases where no such intent ever existed, provided there be a riot and injury done, within the terms of the clause. The latter part of the clause enables the jury who try an individual for any felony mentioned in the preceding section, to convict of the offence created by this clause, if they are not satisfied that an offence within the preceding clause is satisfactorily proved.

(*m*) Sec. 11; see also 7 & 8 Geo. IV. c. 30, sec. 8; 23 & 24 Geo. III. c. 20, secs. 7, 8; & 27 Geo. III. c. 15, sec. 5; Barwell v. Winterstroke, 19 L.J. Q.B. 206.

(*n*) See 1 & 2 Will. IV. c. 44, sec.

2; Rex v. Thomas, 1 Russ. C. & M. 270; 4 C. & P. 237; Rex v. Price, 5 C. & P. 510; Rex v. Batt, 6 C. & P. 329; Reg. v. Howell, 9 C. & P. 437; Reg. v. Adams, 1 C. & M. 299.



Apprehending offenders.

The apprehending of persons committing any offence specified in 24 & 25 Vic. c. 97, is provided for by the 61st section of that statute, and is as follows: "Any person found committing any offence against this Act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace to be dealt with according to law" (o).

24 & 25  
Vic. c. 100.

By section 26 of 24 & 25 Vic. c. 100, it is provided that, "Whosoever, being legally liable, either as a master or mistress, to provide for any apprentice or servant necessary food, clothing or lodging, shall wilfully and without lawful excuse refuse or neglect to provide for the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour" (p).

Masters and workmen.

Ill-treatment.

Ireland and Scotland.

All the before-mentioned statutes apply to Ireland as well as England, but not to Scotland, unless where otherwise expressly provided.

MAN-SLAUGHTER

When a person is in a public situation, having certain duties to perform, and especially when on their performance or non-performance depend the safety or insecurity of other people, then the public have a right to expect a greater degree of caution than under other circumstances would be

(o) Similar clause in 7 & 8 Geo. IV. c. 30, sec. 28; 9 Geo. IV. c. 56, sec. 35; Reg. v. Fraser, 1 Mood. C.C. 419.

(p) See similar clause 14 & 15 Vic. c. 11, sec. 1.

required; the culpable neglect of such duties whereby death ensues, will sustain a criminal charge of manslaughter. Man-slaughter.  
 In the case of *Rex v. Haines*, it was the duty of the defendant, as ground bailiff of a mine, to cause the mine to be properly ventilated by causing air-headings to be put up where necessary; the bailiff neglected this part of his duty, in consequence whereof a person was killed by an explosion of fire-damp, and on a trial of the delinquent for manslaughter, the learned judge who tried the cause, directed the jury to find a verdict of guilty if they thought there was a want of ordinary and reasonable precaution in not providing the air-headings (*q*). The same principle was laid down in the case of *Reg. v. Barrett* (*r*).

In another case, the prisoner was indicted for manslaughter, the offence being occasioned by the falling of a truck full of bricks into the shaft of a mine where the deceased was at work, it being the duty of the prisoner to have placed a stage over the mouth of the shaft, which he neglected to do, and the judge left it to the jury to say whether the accident happened through the negligence of the prisoner, the jury found in the affirmative, and the Court of Criminal Appeal affirmed the conviction (*s*).

In the case of *Reg. v. Lowe*, the prisoner was charged with manslaughter for allowing a boy to perform a duty in reference to the raising and letting down a skip or basket for the accommodation of the workmen, which it was the duty of the prisoner to have performed. The prisoner was found guilty, and Lord Campbell said, in reference to that case, "that an act of omission, as well as of commission, may be so criminal as to be the subject of an indictment for manslaughter" (*t*).

(*q*) 2 C. & Kir. 368.

(*r*) 2 C. & Kir. 343.

(*s*) 7 Cox's C.C. 301.

(*t*) 4 Cox's C.C. 449.

## CHAPTER XXIV.

## PRECEDENTS FOR LICENSES AND LEASES.

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## LICENSE TO SEARCH FOR MINERALS.

CHARLES TREVELYAN, of \_\_\_\_\_, in the county  
of \_\_\_\_\_, Esq., hereby gives and grants to Paul  
Williams, of \_\_\_\_\_, in the county aforesaid, miner, full,  
exclusive (a), and irrevocable *license* and authority to  
search for tin, copper, lead, and all other minerals, for the  
period of one year, of, in, and throughout *All* that estate  
called \_\_\_\_\_, situate in the parish of \_\_\_\_\_, in  
the county aforesaid, now in the occupation of \_\_\_\_\_,  
upon the following terms, that is to say : that the said Paul

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(a) Ante, p. 311.



Williams forthwith commences and, during the aforesaid time, continues to explore the said lands and search for the minerals therein, in a skilful and workmanlike manner: that the said Paul Williams do and shall pay unto the said Charles Trevelyan one-eighteenth part of all monies arising from the minerals which shall be gotten and sold from the said estate, immediately after every such sale, without any deduction for rates or taxes, property-tax only excepted: That the said Paul Williams do make ample compensation for all damages or injury which may be occasioned to the said estates, and the crops and cattle thereon, or the adjoining estates; such compensation to be fixed by the toller or agent for the time being of the said Charles Trevelyan, his heirs or assigns, in case the parties differ about the same: That, provided the said lands have, during the period aforesaid, been effectually worked and explored, and the said Paul Williams, at or before the expiration of the said period, obtains such a company of adventurers for carrying on the said mines, as shall be satisfactory to and approved of by the said Charles Trevelyan, then the said Paul Williams shall be entitled to a lease for the term of twenty-one years, to be granted by the said Charles Trevelyan to such of the adventurers who may propose to carry on the said mine, as the said Charles Trevelyan may nominate for that purpose, on the terms aforesaid, and subject thereto, to such other exceptions, covenants, clauses, and provisions, as are usually inserted in mining leases granted by the said Charles Trevelyan, for the manor of .

Dated this       day of       , 1864.

---

LEASE OF A TIN, COPPER, OR LEAD, MINE.

*This Indenture*, made the       day of       , 1864,  
*Between* Walter Molesworth St. Aubyn, of       , Esq.,  
 hereinafter called the "lessor," of the one part, and William  
 Harris and Richard Thompson, both of       , gentlemen,  
 hereinafter called the "lessees," of the other part, *Witnesseth*

Parcels de-  
scribed.

that in consideration of the rents, reservations, covenants, and conditions hereinafter mentioned, on the part of the said lessees, to be paid, observed, and performed: The said lessor *doth* give and grant unto the said lessees license, power, and authority at all times during the continuance of this demise, to dig, work, mine, and search for tin, copper, lead, and all ores, metals, and minerals, in and throughout *All* that part of the manor of \_\_\_\_\_, situate within the parish of \_\_\_\_\_, in the county of \_\_\_\_\_, comprised within the following limits (that is to say): From a stone post, marked P. 1, placed in the north-west corner of a garden situate on the right-hand side of the road leading from \_\_\_\_\_ to \_\_\_\_\_, in the occupation of \_\_\_\_\_, and from thence to a stone post, marked P. 2, placed in the western hedge of \_\_\_\_\_, being the northern boundary of the said manor of \_\_\_\_\_, from thence eastward by the line of stone posts placed in the said \_\_\_\_\_ to a stone post, marked P. 3, situate near the boundary stone between the tenements of \_\_\_\_\_ and \_\_\_\_\_, and from thence south in a straight line to a stone post, marked P. 4, placed in the hedge of a croft, part of the tenement of \_\_\_\_\_, in the occupation of \_\_\_\_\_, and from thence in a westerly direction to a stone post, marked P. 5, placed in a field, part of the tenement of \_\_\_\_\_, in the occupation of \_\_\_\_\_, and from thence in a straight line to a stone post, marked P. 6, placed in a field, part of the tenement of \_\_\_\_\_, in the occupation of \_\_\_\_\_, and from thence by the hedge of the same field to the centre of the \_\_\_\_\_ and \_\_\_\_\_ road, and from thence, to the aforesaid stone post marked P. 1. All which said premises are now in the several occupations of \_\_\_\_\_, and are hereinafter denominated or referred to by the word "limits."

Another  
description  
of parcels.

(*All* those several fields of the said lessor situate within the parish of \_\_\_\_\_, in the said county of \_\_\_\_\_, and in the Tithe Commutation Map of the said parish, numbered respectively 41, 56, 97, . . . . and in and throughout parts of all those several other fields of the said lessor, numbered respectively in the said map 92, 95, and which said fields and parts of fields are more particularly

delineated in the map or plan hereon endorsed, and therein coloured blue, and are now in the occupation of \_\_\_\_\_, as tenant to the said lessor, and are hereinafter referred to by the word "limits.")

And the tin, copper, lead, and all other ores, metals, and minerals which shall be gotten or found within the limits aforesaid, there to raise and bring to grass, and then to spall, stamp, and make merchantable and fit for sale, and (subject to the reservations, covenants, and conditions hereinafter contained) to carry away and dispose of the same to their own use, and to dig and make any adits, drifts, shafts, pits, leats, or other conveniences, and to erect any houses, sheds, engines, or other machines or buildings within the limits hereby granted for working the mines intended to be carried on therein, and to make such and so many waggon-roads or railroads, or any other roads necessary, which may be necessary or proper for the carrying away of the ores or materials, or for the exercise of the license, liberties, powers, and authorities hereby given; and to raise, dig, and get stone, sand, brick-earth, or clay, for the erection of any building or for any of the purposes aforesaid, doing as little damage as possible in the exercise of the several liberties and powers hereby granted, and not interfering with any former lease now subsisting, and paying for any destruction or damage to the surface of the lands as herein provided. *Reserving* unto the said lessor all waters and water-courses, with liberty to convey the same or any other waters and water-courses through or over the said limits or any part thereof, or any adits or drifts therein for any purpose whatsoever, not inconsistent with or derogatory from the powers, liberties, licenses, and authorities hereby given and granted. *And also* reserving unto the said lessor and his and their agents liberty at all times to go down into and through the said mine and workings for the purpose of inspecting the same, and to dial, examine and measure the same, and for those purposes to make use of any of the machinery and tackle employed or used in the said mine. *And also* liberty at any time to enter into and upon any of the limits aforesaid for the

Liberties  
and powers  
to lessees.

Reserva-  
tions.



Haben-  
dum.

Redden-  
dum.

purpose of examining the state and condition of the mines and works erected thereon, and for inspecting the said ores, metals, and minerals which may from time to time be raised to the surface, in order to see that the same are properly spalled, rendered fit for, stamped, dressed, and made merchantable and fit for sale. *And also* free liberty at any time for the said lessor and his and their workmen and agents to make from any part of the said limits at or above the level of the deepest adit therein, any adits or drifts with shafts necessary and proper for driving and continuing the same, into any other lands of the said lessor, or as far as he or they lawfully may, into the lands of any other person or persons whomsoever, and to keep open, repair, and use the same. *To have, use, exercise, and enjoy* the said several liberties, licenses, powers, and authorities hereby granted (subject as aforesaid), together with all and singular way, water-courses subject as aforesaid, and the appurtenances, unto the said lessees for the term of        years from the        day of       , determinable nevertheless as hereinafter mentioned. *Yielding and paying* unto the said lessor, as and by way of rent, the sum of £50 (*b*), by equal half-yearly payments, on the day of        and the        day of        in each year during the said term, the first payment to be made on the        day of        next, free and clear from all rates, taxes, and impositions whatsoever (except property-tax), subject nevertheless to be reduced by any amount which shall have been actually paid in each year under the reservation next hereinafter contained, it being the intent and meaning of the parties to these presents that a clear sum of not less than £        shall be paid to the said lessor in each and every year under and by virtue of these presents. *And also yielding and paying* (*c*), as and by way of rent, unto the said       , one full        part of all the monies for which all the ores, metals, and minerals to be raised or gotten within or from the said limits during the said term, shall be sold, or contracted to be sold; the said ores, metals, and minerals, according to the nature thereof, being first well and truly spalled, dressed, stamped, and rendered merchantable and

(*b*) Ante, p. 294.

(*c*) Ante, pp. 294, 517, 521, 526.

fit for sale by and at the expense of the said lessees, before the sale of any part thereof, and every such payment to be made without any deduction or abatement whatsoever for or in respect of any present or future taxes, charges, rates, or assessments whatsoever (except property-tax), at the end of two calendar months next after the sale of the same ores, metals, and minerals.

(*Rendering and delivering* unto the said lessor, yearly and every year during the continuance of the said term, one full part or share of all ores (*d*) to be from time to time produced and obtained by the said lessees for the time being from or out of the mines and premises hereby demised, well and sufficiently washed, cleansed, and made fit for smelting (*e*), according to the best and most improved mode practised within the said manor, free and clear from all rates, taxes, and impositions now or hereafter to be imposed by Act of Parliament or otherwise, and all other charges and expenses whatsoever relating thereto (except property-tax).

Another  
reddendum  
form.

And the said lessees do hereby covenant (*f*) with the said lessor, in manner following, that is to say: *That* they, the said lessees, will pay unto the said lessor the said several rents, royalties, sum and sums of money hereinbefore reserved and made payable as aforesaid, upon the respective days and times and in manner hereinbefore appointed for payment of the same respectively, according to the true intent and meaning of these presents, without any deduction or abatement whatsoever (except property-tax). And will at all times during the said term pay and discharge all rates, taxes, charges, payments, assessments, and impositions whatsoever (except the grantor's property-tax) which now are or at any time during the continuance of the said term may be charged or imposed upon or in respect of the said mines to be worked and carried on by virtue of these presents, or the said rents or sums of money hereby reserved and made payable, and also all rent charges in lieu of tithes charged upon or issuing out of such of the lands comprised within the limits aforesaid, as he, the said lessee,

Covenants.

To pay  
rents.

Taxes.

(*d*) Under this reservation, rates are payable, ante, p. 515; also p. 294.

(*e*) Ante, p. 521.

(*f*) Ante, pp. 296, 305.

Effectually  
working  
mines.

shall take possession of, use, or occupy, under the grant or the powers or authorities herein contained. *And* that the said lessees will forthwith begin, and afterwards during the continuance of the said term, effectively and regularly explore and try the lands within the limits aforesaid in a proper and workmanlike manner, and carry on the said mines agreed to be undertaken and prosecuted within the limits aforesaid and the bottoms thereof, and every lode therein discovered or to be discovered therein, according to the most modern approved practice of good miners; and drive and keep forward all adits and levels of or belonging to the said mines, and continue the same in their proper directions, and with a due preservation of levels to the extent of the limits aforesaid, with as many able-bodied men as can conveniently be employed therein. *And also* that it shall be lawful for the said lessor, and without determining this demise as to the rest of the said limits, to enter into, work, and carry on, for his and their own use and benefit, such of the lodes and veins now or hereafter to be discovered within the said limits as shall not be fully and effectually wrought by the said lessees by the space of two calendar months, on giving to the said lessees, or leaving on some part of the said limits (either before or after the expiration of such two months), one calendar month's notice in writing of his intention so to do, and for that purpose to use all the levels, drifts, adits, or shafts then and there being, and also to have the use and advantage of all such ropes, engines, buckets, and other materials as shall then be on the said mine, at pleasure, and gratis. *And also* shall and will forthwith erect within the aforesaid limits (or on the adjoining lands to be worked in connexion with those limits) such good and sufficient engine or engines, to be each equal at least to a      inch cylinder, and such other machinery as may be necessary for well and effectually draining and constantly keeping drained and cleared the deepest and lowest levels of the said mine, and for opening and working the said limits to the bottoms thereof in a proper and workmanlike manner, and according to the most approved custom of good miners. *And*

Lessor to  
work un-  
worked  
limits.

Erection of  
engines.



shall and will, without intermission, pursue and sink, work, and raise in the best and most effectual manner, and with a sufficient number of able workmen, all such lodes, veins, and branches of metals, ores, and metallic minerals now or hereafter to be discovered within the said limits. *And also* will work and continue to work, without intermission, the engine now erected within the aforesaid limits respectively, so that the said mines may be carried on and effectually wrought at all times during the said term without interruption on account of water accumulating therein, except the same be occasioned by accident or unavoidable impediments. *And* will, at their own expense, without any unnecessary delay, well and truly spall and render fit for stamping, dress and make merchantable and fit for sale, in a proper manner, and sell the said ores, metals, and minerals, either by public sale or private contract, for the best price or prices in money that can be obtained for the same, giving unto the said lessor three clear days' previous notice in writing of the time of such proposed sale. *And* will not mix any of such ores, metals, or minerals with those of any other mine, without leave in writing first obtained for that purpose, nor sample or sell the same with such other ores; and will, during the said term, give unto the said lessor, or to his or their known agent, full three days' notice in writing of the time of every sale of tin, copper, lead, or other ores, metals, or minerals raised within the limits aforesaid. *And also* will during the continuance of the said term keep all the engine-houses and other buildings erected or to be erected within the said limits in substantial repair; and well and sufficiently bind, secure, repair, and keep open with timber and fixed stemples and props, and by other good, effectual, and durable means, all adits, levels, drifts, shafts, and other the workings within the limits aforesaid; and the same severally in such repair and firmly bound, secured, and kept open and supported as aforesaid; and the shafts effectually sollared; and the whole in good order for the further prosecution thereof, will at the expiration or other sooner determination of the said term peaceably and quietly leave and yield

Working  
engines.

Mixing  
ores.

Repairing  
machinery.

Lessor's  
option to  
purchase  
machinery.

Plans.

Names of  
adven-  
turers.

Accounts.

up (g). *And also* shall and will at the end or other sooner determination of this demise, leave all the engines, machinery, materials, and tackle thereunto belonging, and being in and upon the mine, for the period of six months next after the determination of this lease, within which period the lessor shall have the option of purchasing all or any of the engines, machinery, materials, and tackle, which are legally removeable by a tenant, at a valuation, but so that no part of any engine shall be taken without taking the whole; the price of such of the said engines, machinery, materials, and tackle elected to be taken by the said lessor, and the time of payment, to be ascertained in case of dispute by arbitration, in manner hereinafter provided; but if the said lessor do not elect to take at a valuation as aforesaid the said engines, machinery, or other effects, then it shall be lawful for the said lessees at any time within six months next after notice in writing to that effect to the said lessees given by the said lessor or his agent, or, in default of such notice, within six months next after such election might have been made as aforesaid, notwithstanding the determination of the said lease, to enter upon the said hereby demised premises for the purpose of selling and removing the same, without being obliged to repair any buildings which shall be necessarily destroyed or injured in taking down and removing the same. *And also* will once in every year (or oftener if required), at their own expense, provide for and deliver to the said lessor or his or their known agent, a correct plan and section of the mines or works carried on and prosecuted for the time being within the limits aforesaid, and of all lodes and veins therein respectively. *And* will whenever they shall be called upon for that purpose, supply at their own expense, to the said lessor or his or their known agent, a perfect list of the names, places of abode, number of shares, and interest of every adventurer concerned in the working of the said mines. *And also* will, during the said term, keep upon some part of the said mines, true and regular accounts in books, of all ores, metals, and minerals as afore-

said, which shall be raised or gotten within the limits aforesaid, and of the sales of all such ores, metals, and minerals, and the names of the respective purchasers thereof, and of all other matters and things relating to or concerning the working of the said mines, and the disposal of the produce thereof; and permit and suffer the said lessor and his agents, and other persons by him or them authorized, upon demand at the counting-house of the mine, or at the house of the purser, to examine and take copies of every book kept for the use of the said mines, containing any account of the tin, copper, and other ores, metals, and minerals raised or gotten out of the said limits, and of the disposal, price, and value thereof, or in any manner showing the produce of the said mines and the receipts and expenditure thereof. *And also* will preserve and lay aside in heaps on some convenient place for the use of the said lessor, all the meal, earth, and soil which shall be dug up in the prosecution of the said adventure, and shall not within twelve months after lay any ores or rubbish thereon, within which time the lessor may remove the same. *And* will at all times during the said term, make and keep up sufficient fences (*h*) round every shaft and open part of any adit or workings, within the limits aforesaid, and at the end or other sooner determination of the said term, leave the same so fenced and the shafts effectually sollared. *And also* will well and sufficiently repair every road, hedge, and gate which may be injured. *And also* make such compensation and satisfaction for all damage occasioned to the land or premises, cattle or goods, of any tenant or occupier thereof by working the said mines, the amount of such compensation to be fixed by arbitration, in manner hereinafter prescribed. *And also* will upon demand, pay unto the said lessor for every statute acre of all enclosed and cultivated land within the limits aforesaid which shall be taken and damaged by the said lessees for the purpose of working and carrying on the said mines, the sum of £100 sterling, and so in proportion for any less quantity of ground than an acre; and for every statute acre of land of an inferior description within the limits aforesaid which shall be

Preservation of earth.

Fences.

Compensation.

(*h*) Ante, pp. 218, 262, 547.



Fouling  
rivers.

Restric-  
tions as to  
shafts and  
erections.

Orchard or  
garden  
ground.

taken or used for the purpose aforesaid, the sum of £50 sterling, and so in proportion for any less quantity of land than an acre, the amounts thereof respectively to be paid as soon as the quantity of land shall from time to time be ascertained. *And* will during the said term conduct and convey away all the water which shall be drawn from the said mine or the bottoms thereof, or used for dressing any ores, or any other purpose whatsoever, so that the same shall not flow into, nor in any way injure or foul the streams of water or rivulets now running through the estates of                      and                      ; and for this purpose will make, provide, and erect all necessary leats, conduits, pipes, and launders at his own expense, and cleanse and scour the said leats, conduits, pipes, and launders, as often as occasion shall require; and will not do or commit any act, matter, or thing, whereby the same streams of water or rivulets may be injured or fouled. *And* will not during the said term, sink any shaft or shafts, pit or pits, within or upon any part of the estates of                      , or                      , or either of them, now in the several occupations of the said                      , or their tenants, or in any lands of the said lessor, situate to the right and eastward of a certain road leading from                      to                      aforesaid, or within seventy fathoms of a certain plantation called                      , or either of them, or any part thereof, nor bring or lay thereupon any tin, copper, lead, or other ores, metals, or minerals, or mining or other materials, or deads or rubbish, or other matter or thing whatsoever, nor erect or build or make or permit or suffer to be erected, built, or made within the said estates or places, any erections, buildings, or paths whatsoever, nor do or permit or suffer to be done any other act, matter, or thing, whereby or by means whereof the surface or pasture thereof or any part thereof shall or may be in anywise injured, defaced, damaged, or destroyed. *And* will not erect or build or suffer to be erected or built, any burning-house or stamps on any part of either of the said estates or places aforesaid. *And* will not break or enter, or in anywise injure or damage the surface of any homestead, orchard, or garden plot, or

ground on which farm-buildings or cottages are standing, without leave in writing from the said lessor for that purpose first had and obtained. *And further*, that it shall be lawful at all times for the said lessor and his agents, either alone or with any other person or persons, to go down into, examine and measure, and ascend from all or any of the workings of the said mines, and for that purpose to use the tackle and other conveniences then and there being, and gratis. *And* the lessor covenants (i) with the lessee in manner following, that is to say:—*that* he, the said lessor, has full power and authority to grant this present lease in manner aforesaid according to the true intent and meaning of these presents; *And* that it shall be lawful for the said lessees for the time being, at all times during the continuance of this lease, paying and performing the rents, reservations, covenants, provisoes, and agreements hereinbefore, on their part respectively contained, peaceably and quietly (j) to possess and enjoy the said several licenses, liberties, and privileges in manner aforesaid, for their own use and benefit, without any disturbance, claim, or demand whatever, from or by the said lessor, or any person lawfully claiming through or in trust for him; *And* that free, and clear, and well, and sufficiently defended and indemnified by the said lessor from and against all other estates, titles, debts, and incumbrances whatever, either already or to be hereafter made, occasioned, or suffered by the said lessor, or any person lawfully claiming or to claim by or through him; *and further*, that the said lessor, and all other persons having, or claiming, or who shall or may hereafter have or claim any estate or interest in the said demised premises, or any part thereof, under or in trust for him the said lessor, shall and will, in any of the events aforesaid, from time to time, and at all times hereafter, upon every reasonable request, and at the proper costs and charges of the said lessees for the time being, do and execute all such further and other lawful and reasonable acts, deeds, things, conveyances, and assurances, in the law whatsoever, for the further bettering and more

Covenants  
by lessor  
for title,

quiet en-  
joyment.

Free from  
incum-  
brances.

Further  
assurance.

(i) Ante, p. 297.

(j) Ante, p. 305.

Re-entry  
in default.

perfectly demising the said premises hereby intended to be demised, with their appurtenances in manner aforesaid, according to the true intent and meaning of these presents, as by the said lessees for the time being, or their counsel in the law, shall be reasonably advised or required. *Provided always*, that if all or any part of the rent or royalties hereinbefore reserved, or the monies hereinbefore made payable to the said lessor shall at any time during the said term be in arrear or unpaid by the space of thirty days next after the same shall have become payable under the reservations thereof hereinbefore respectively contained, then, and as often as it shall so happen, it shall be lawful for the said lessor or his agents for the time being, or any person or persons on his behalf, to enter into and upon the said mines within the limits aforesaid, and there to seize and distrain all or any of the ores, engines, machinery, goods, chattels, and personal effects which shall be then and there found, and in due time after the same shall have been so seized and distrained (unless the same rents and monies so being in arrear, and all expenses incurred in and about the distress shall be sooner paid), to cause the same ores, engines, machinery, goods, chattels, and personal effects, to be appraised and sold, or otherwise disposed of according to law, as in cases of ordinary distresses for rent in arrear; and out of the proceeds of every such sale to retain the said rents and monies so being in arrear, together with all costs and expenses of and incidental to every such distress; rendering the surplus (if any) to the said lessees, or paying the same to their credit at some banking-house in the said county. *Provided also*, that if the said rents hereby reserved, or the monies hereby made payable, or any part thereof, shall not be duly yielded or paid according to the true intent and meaning of these presents, or if the said lessees shall, at any time during the said term, for two months consecutively, discontinue to work or refuse or neglect to carry on the said mines in the most effectual manner, according to the most approved practice of good miners, and in conformity with the terms of this lease, or shall fail to observe or perform the several covenants

Power for  
lessor to  
revoke  
deed.



and conditions hereinbefore contained, or any or either of them, and which on his and their parts respectively are, or ought to be, observed, performed, and kept, then and thenceforth and in any or either of the said cases it shall be lawful for the said lessor by any deed or deeds under his hand to revoke, countermand, and determine the several liberties, licenses, powers, and authorities hereby granted; and immediately after notice in writing of such deed or deeds shall have been delivered to the said lessees, or any or either of them, or the purser, manager, or principal captain for the time being of the said mines, or left for them or him respectively, at their or his then or then last-known dwelling-house or place of abode, or at the account-house, or other public place upon or belonging to the said mines, this present indenture, and the liberties, licenses, powers, and authorities hereby granted, and every article, clause, matter, and thing herein contained, shall cease, determine, and be absolutely void, save and except as far as concerns and for the purpose of enforcing any right of action which shall or may have accrued to the said lessor or lessees respectively, by reason of the breach or non-performance of all or any of the covenants and conditions hereinbefore contained; and the said lessor shall be at liberty immediately thereupon, or at any time thereafter, although no advantage may have been taken of any previous instance of neglect or default, to take possession of the said mines and premises, either personally or by his or their known agent, and in the latter case, without a regular power of attorney for that purpose, and the same to have again, enjoy, and re-grant, as if these presents had never been made, without being compelled to have recourse to any suit at law or in equity to effect such purpose. *Provided also*, that in case the said lessees shall be desirous of quitting or delivering up possession of the said mine at any time before the expiration of the said term, and of such their desire, shall give to the said lessor six calendar months' previous notice in writing, signed by them, or any or either of them; then, and in such case, upon full payment of all the dues or rent hereinbefore reserved, and observance and performance of all the covenants and pro-

Power for  
lessees to  
determine  
lease.

visions herein contained on the part of the said lessee, this present indenture, and the liberties, licenses, and authorities hereby granted, shall, at the expiration of the same six calendar months, cease, determine, and become absolutely void except for the purpose of enforcing any rights of action which shall have accrued to either of the parties hitherto by reason of any breach of all or any of the covenants and agreements hereinbefore contained.

Arbitra-  
tion.

Further  
lease.

"Lessor"  
"lessee"  
defined.

*(Insert clauses for referring all disputes to arbitration; also for obtaining a further lease, as at pages 650 and 651.)*

*Provided, lastly,* that the heirs and assigns of the said Charles Trevelyan, hereinbefore called the lessor, and the executors, administrators, and assigns of the said William Harris and Richard Thompson, hereinbefore called the lessees, shall be bound by and entitled to the benefit of these presents, and the covenants, conditions, provisoes, and agreements herein contained, in like manner as if they had been respectively named therein throughout next after the words "lessor" and "lessees," respectively, as far as the same will admit, and unless the context or the nature of the case may require a different construction.

*In witness* whereof the said parties to these presents (written or engrossed on skins or pieces of parchment) have hereunto set their hands and seals the day and year first above written.

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#### LEASE OF COAL MINES IN THE NORTH OF ENGLAND.

*This Indenture*, made the                      day of                      , A.D. 1864, *between* Richard Fenwick, of                      , Esq., hereinafter called the "lessor," of the one part, and Alfred Wilkinson, of                      , merchant, hereinafter called the "lessee," of the other part, *Witnesseth* that in consideration of the rents and sums of money, covenants, provisoes, and agreements, hereinafter respectively reserved and contained, and by or on the part of the said lessee to be paid, observed,

and performed respectively, he, the said lessor, doth hereby grant and demise unto the said lessee, *All* and every the mines and seams of coals (*k*) situate within or under, or which can or may be had, wrought, or gotten, in, from, or out of *All* those fields, containing about fifty acres, being part and parcel of an estate called \_\_\_\_\_, situate within the township of \_\_\_\_\_ and parish of \_\_\_\_\_, in the county of Durham, and which said fields are delineated and coloured blue on the plan endorsed on the first skin of these presents. *Together* with full power and authority to and for the said lessee, subject to the restrictions, provisoes, and covenants hereinafter contained, in and upon the lands aforesaid, to dig, sink, drive, and make pits, shafts, trenches, graves, drifts, air-courses, water-gates, water-courses, as well for the winning, working, and getting of coals, in, forth, and out of the said mines and seams hereby demised, and all or any other mines or seams in or by the use or exercise of the powers in that behalf hereinafter contained, as for the draining and ventilating the said respective mines and seams or any of them; *and also* liberty and power of outstroke and instroke, from and out of, and to and into all or any of the mines or seams hereby demised, to and into, or towards and from, and out of all or any other mines or seams now belonging to or worked by, or hereafter during the continuance of this demise to belong to, or be worked by the said lessee, without leaving any barrier between the mines or seams hereby demised, and such other mines or seams or any of them, unless the said lessee shall think proper so to do; and liberty and power by means of all or any of such outstrokes or instrokes to win and work coals out of any such other mines or seams as aforesaid, and to draw and bring the same to bank at all or any of the pits or shafts of the mines and seams hereby demised, to be sunk or made in the lands hereinbefore described or any part thereof, or to lead away underground the same coals or any part thereof, and also all or any coals the produce of the mines or seams hereby demised to or towards any other pits or shafts whatsoever, wheresoever situate; so

Description of property.

Powers to lessee.

To dig and make shafts.

Outstrokes and instrokes.

(*k*) Ante, p. 292.



To make  
coke.

Surface  
accommo-  
dation.

Way-  
leaves.

To con-  
struct  
ways, rail-  
ways.

always that in making and using the said outstrokes and instrokes respectively the said mines, seams, and premises hereby demised, or any of them, be not drowned or destroyed or overburthened with water, foul air, or styth, and so also that as little damage be thereby done to the said last-mentioned mines or seams and premises as the nature of the case will admit. *Together also* with full liberty and power for the said lessee in or upon the lands aforesaid, but subject as aforesaid, to build coke-ovens or furnaces, and thereat to manufacture and burn into coke or cinders any coals to be wrought or gotten forth or out of the mines or seams of coal hereby demised, or out of any such other mines or seams, by means of such outstrokes or instrokes as aforesaid. *And also* to have and use sufficient and convenient heap room, ground room, and pit room, for laying all such coals, stones, gravel, and earth, as shall from time to time be gotten and brought to bank, as well forth and out of such other mines and premises as aforesaid by the means aforesaid, as forth and out of the said mines and premises hereby demised, and the coke to be made from such coals respectively; *and also* full and sufficient way-leave and passage to and for the said lessee both underground and upon and over the surface of the lands hereinbefore described (but subject as aforesaid), to take, lead, carry away, and sell, with horses, carts, waggons, or any other carriages, not only all or any of the coals to be by the said lessee wrought and gotten in and out of the said mines and premises hereby demised, but all or any of the coals to be by him wrought and gotten in and out of any such other mines or premises as aforesaid by the means aforesaid, and the coke to be made from the said coals respectively, and for that purpose or for the purpose of conveying colliery or mining materials, to or from or for the use of the said hereby demised and other mines and premises respectively, to make and use railways, waggon-ways, and other ways (*l*) or road within, over, and upon the lands hereinbefore described, or any part thereof, but in such situations only as shall be agreed upon by the said

(*l*) Ante, p. 506.

lessor and the said lessee, or their respective agents or colliery viewers, or in case of disagreement, then as shall be determined by arbitration in manner hereinafter provided ; and upon or for the use of such railways or other ways or roads, to erect and use horses and stationary or locomotive or other engines and rope, or other machinery or other motive power at present known or of future invention.

*And* with full power and authority upon the said lands, subject as aforesaid, to erect and build agents' and workmen's houses, engines, and engine-houses, workshops, store-houses, granaries, stables, sheds, and all other necessary erections and buildings, for drawing or raising of coals or water, or for the standing of horses, and laying and placing of coals, coke, and rubbish, and workmen's and other materials, to be used or employed in or about the said mines and premises hereby demised, and such other mines as aforesaid, for the time being wrought or carried on by the means aforesaid, and for all other necessary and usual colliery purposes, for or in connexion with the said respective mines and premises and the use or exercise of the powers and liberties hereby granted or any of them, so always that no erections or buildings be made or set up by virtue of the powers herein contained within two hundred yards of any farm, onstead, or dwelling-house, at present or hereafter to be erected upon the said lands, and so that as little damage be done as reasonably may be to the said lands, and so that such coke ovens, workmen's or agents' houses shall be built in such numbers and situations only as the said lessor from time to time by any writing under his hand may permit or allow. *And also* power and liberty in and upon the said lands, subject as aforesaid, to dig and get clay, and to make and burn bricks and tiles, and to win and work quarries of stone and lime, and to burn lime, and to get earth, soil, and rubbish ; such bricks and tiles, stone, lime, earth, soil, and rubbish respectively to be used or employed only for or in the exercise of the powers and liberties herein contained or some of them, but not for sale or any other use or purpose whatsoever ; and generally *full* power and authority to do all and whatsoever shall be neces-

Erection of  
engines  
and build-  
ings.

To work  
quarries.

General  
powers.

Reserva-  
tions to  
lessor.

Of mines  
not de-  
mised.

Use of  
ways.

Way-  
leaves.

Ways,  
railways.

sary or convenient, for, in, or about the winning, working, and getting and vending of coals, in, out of, and from, the said demised mines and premises, and such other mines and premises as aforesaid, by the means aforesaid, and the making and vending of coke therefrom respectively, and the effectual exercise, use, and enjoyment of the powers and liberties herein contained, and every or any of them, subject always and without prejudice to the restrictions, qualifications, and covenants herein contained, *except and always reserved* unto the said lessor, full and free right, power, and liberty, to bore or otherwise search for, win, and work, and to carry away the produce of all or any quarries of stone, mines, and seams of ironstone, fire clay, and other minerals and substrata whatsoever, in or under the said lands hereinbefore described other than the mines and seams of coal hereby demised. *And also* to pass and repass over and across any railway or other way or road, to be made or used by the said lessee by virtue of these presents, on foot or horseback, or with or without horses, or other animals, and carts or other carriages laden or unladen. *And also* to have and use for any purpose or purposes, any way-leave whatsoever both underground and upon the surface, within, through, over, and along all and every or any of the lands aforesaid, with liberty to make, lay, and place, and use thereon or therein, any railways or other ways or roads, and therewith to cross and intersect any railways or other ways or roads to be made, laid, or used by the said lessee, by virtue of these presents. *And also except and reserved* to and for the said lessor, his servants, tenants, and farmers, for the use, benefit, and improvement of their lands, liberty and power to pass and repass upon and along the railways and other ways or roads to be made or used by the said lessee, by virtue of these presents, on foot or on horseback, or with or without horses, or other animals, engines, waggons, trucks, carts, or other carriages, laden or unladen, such carriages and engines used on such railways or waggon-ways respectively having wheels properly constructed for travelling on the same ways without paying any compensation in respect thereof. *And also*



full power and liberty for the said lessor to use the railways and other ways to be made or used by the said lessee, by virtue of these presents, as well for leading, carrying, or conveying of coals and other colliery or mining produce and materials, to and from or for the use of any coal mines or other mines whatsoever, as for the conveyance of passengers and purposes of general traffic, or for any other purpose whatsoever, provided that all engines, waggons, and carriages which shall be used for any of the purposes of this present exception, have wheels properly constructed for travelling on such ways, and that the said lessor or his grantees or lessees shall make a fair compensation to the said lessee for the wear and tear of way occasioned by the exercise of the liberties and privileges in this exception contained, such compensation to be ascertained or settled in case of difference by arbitration in manner hereinafter provided. And also, *except and reserved* to the said lessor full power and liberty to grant and demise all or any of the said excepted and reserved powers and liberties, or the use or exercise thereof, to any person or persons, company or corporation whomsoever or whatsoever. Provided that in the exercise or use thereof, whether by the said lessor or by his grantees or lessees, as little hindrance or interruption as reasonably or conveniently may be, shall be given to the said lessee or his agents, servants, or workmen, in the use and exercise of the powers and authorities hereinbefore granted or demised. And also provided that when any railway or waggon-way to be made or used by the said lessee, by virtue of these presents, and any other railway or waggon-way that may be made by virtue of the exceptions or reservations in that behalf hereinafter contained, shall be laid or placed so as to cross or intersect each other, at any place on the lands hereinbefore described, where a stationary engine or self-acting inclined plane or a rope or ropes, is, are, or shall be used on or for both or either of such railways or waggon-ways, the person or persons, company or corporation, by whom such crossing or intersection shall be made, shall at his or their own expense, if so required, by the other party, make the same by means of a

Railways  
and other  
ways.

bridge or arch or tunnel over or under the railway or waggon-way of such other party, and shall keep such bridge, arch, or tunnel, and the other works necessary for the said crossing or intersection in good order and repair. And also excepting and reserving full power and authority to and for the said lessor, or his agents or servants, to stop and prevent the passage of all persons, horses, and other animals, engines, waggons, and other carriages and commodities whatsoever, passing or being along or upon any railways or other ways to be made or used under the powers and liberties hereby granted, other than and except such as are hereby authorized to pass or be along or upon the same, or to take and impound all horses and other animals, and all engines, waggons, and other carriages, and the contents thereof (other than and except as aforesaid), which shall be found passing or being along or upon the same railways or other ways or any of them. *To have and to hold, use, exercise, and enjoy* the said mines and seams of coal with the powers, liberties, and other the powers hereinbefore mentioned and granted or demised or intended so to be, subject to the exceptions, reservations, restrictions, and qualifications aforesaid, unto the lessee from the first day of May, 1864, for the term of            years thence next ensuing, and fully to be complete and ended, subject nevertheless to the provisos for determination of the said term hereinafter contained. *Yielding and paying* therefore during the continuance of the said term unto the said lessor the several yearly certain tentale and other rents or sums of money hereinafter mentioned (that is to say), the yearly certain rent of £400 (*m*), for or in respect of such quantities of coals to be yearly and every year during the said term wrought, gotten, and brought to bank out of the mines and seams hereby demised (other than coals hereinafter exempted from rent) as, at the respective rates or prices per ton hereinafter mentioned, and in proportion for a less quantity than a ton, shall be equivalent to the amount of such certain rent; (that is to say) for round or unscreened

Haben-  
dum.

Redden-  
dum.

coals wrought out of the Hutton seam, the rate or price of 22s. 6d. per ton (a ton of coals being throughout these presents taken as equivalent to  $18\frac{1}{3}$  Newcastle chaldrons of 53 cwt. imperial per chaldron); for round or unscreened coals wrought out of the High Main seam, the rate or price of 20s. per ton; and for round or unscreened coals, wrought out of any other seam or seams, the rate or price of 15s. per ton; and for small coals, being such as shall have passed through a screen the bars whereof shall not be more than  $\frac{3}{8}$ ths of an inch asunder, one half of the respective rates or prices aforesaid, according to the respective seams whence the same shall have been wrought or gotten, but the said certain rent to be payable and paid by equal half-yearly payments, on the                      day of                      and the

                    day of                      during the continuance of this demise, whether the equivalent quantities of coals shall or shall not be yearly wrought, gotten, and brought to bank out of the mines and seams hereby demised, and the said certain rent having been paid up to the                      day of

                    last, as the said lessor hereby acknowledges, the next half-yearly payment thereof is to be made on the                      day of                      next. *And also yielding and*

*paying* unto the said lessor, yearly and every year during the continuance of this demise, over and above the said certain rent, the like respective rates or prices per ton, and in proportion for a less quantity than a ton, for all such coals (other than and except as aforesaid) as shall be yearly wrought, gotten, and brought to bank out of the mines and seams hereby demised, over and above the quantities, which at the said rates or prices shall be equivalent to the amount of the said certain rent, the said tentale rent to be payable and paid yearly on the                      day of                      in every year of the said term hereby granted, and so that at each such day of payment the whole amount of such tentale rent for the year then ended or ending shall be fully paid and satisfied. *And also yielding and delivering* during the continuance of this demise, at the staith or drop or depôt at Sunderland or Bishopwearmouth of the said lessee, such quantities of best or round coals, the produce of the mines

Second red-  
dendum.

Third red-  
dendum.



or seams hereby demised (but not exceeding 15 chaldrons of 53 cwt.), in any one year, for the use and consumption of the lessor, as he or his agent shall or may from time to time require, without payment for the same, or in lieu of such last-mentioned reservation and delivery, at the option of the said lessor, yielding and paying to him on the day of , in every year of the said term

hereby granted, the further rent or sum of £ sterling.

Proviso.

*Provided* always, that no rent shall be paid or accounted for in respect of such coals as shall be delivered to or for the said lessor as aforesaid, nor in respect of such small coals as aforesaid, as shall be consumed for the use of the engines, workshops, heap-fires, pit, and railway lamps, agents' and workmen's fires, and other usual colliery purposes, so that the same do not exceed one-ninth of the coals wrought and gotten out of the said demised mines or seams, and also, so that, whilst any other mines or seams shall be wrought or carried on in conjunction with the mines or seams hereby demised, by means of such outstrokes or instrokes as aforesaid, or fair proportion of the coals consumed for the purposes aforesaid, shall be taken from the produce of such other mines

Making up  
deficiencies  
of preced-  
ing years.

or seams. *Provided also*, that if in any year or years of the said term hereby granted there shall not be wrought, gotten, and brought to bank out of the mines and seams hereby demised such a quantity of coals as shall, at the rates or prices aforesaid, be equivalent to the amount of the said certain rent, it shall be lawful for the said lessee, during any succeeding or future year or years of the said term, to work, get, and bring to bank out of the said demised mines and seams such extra quantities of coals as shall be sufficient to make up such short workings or deficiency, without paying any tentale rent or sum of money for the same, other than or beyond the said certain rent, and that this proviso shall apply to and be available for the making up, as well of such short workings or deficiencies as have already occurred since the said day of , as of those which may hereafter occur, but the overworkings in any year or years of the said term hereby

granted, shall not be allowed to come in aid of or to make up the short workings or deficiency in any succeeding or future year or years. *Provided also*, and it is further agreed and declared that it shall be lawful for the said lessee, during the continuance of the said term hereby granted, to work, get, and bring to bank, out of and from the said mines and seams of coal hereby demised, over and above the quantities of coal requisite to make up the said certain rent hereby reserved and the short-workings or deficiencies hereinbefore authorized or allowed to be made up, such further quantities of coals as, at the respective rates or prices aforesaid, shall amount to the sum of £ , being the amount or value of certain short-workings that have accrued during a previous tenancy of the hereby demised premises, without paying any rent or sum for the same, other than or beyond the said certain rent hereby reserved. And *also yielding and paying* unto the said lessor, yearly and every year during the continuance of this demise, the further rent or sum of 2s. 6d. per ton (*n*), and in proportion for a less quantity than a ton, for all coals wrought or gotten by the said lessee from and out of any mines or seams (other than the mines or seams hereby demised) that shall be won, or wrought, or drained, or ventilated, wholly or in part, by means of any such outstrokes or instrokes as are hereinbefore authorized to be used and made respectively, whether such coals shall or shall not be drawn or brought to bank, at or by means of any pit, shaft, or drift of or belonging to the mines or seams hereby demised, and sunk or made in or upon the lands hereinbefore described, the said last-mentioned rent to be considered as payable for outstroke, underground way-leave, water-course, and out-course, and to be payable and paid whether all, or some, or one only of such easements or privileges shall be used or exercised for or in respect of the said coals. And *also yielding and paying* unto the said lessor, yearly and every year during the continuance of this demise, the further rent or sum of 2s. 6d. per ton (*o*), and in proportion for a

Fourth  
red-  
den-  
dum.

Fifth red-  
dendum.

(*n*) Ante, p. 296.

(*o*) Ante, p. 296.

Sixth red-  
dendum.

less quantity than a ton for all coals, the produce of any mines or seams other than the mines or seams hereby demised, that shall, by the said lessee, in exercise of the powers in that behalf hereinbefore contained, be brought or drawn to bank, at or by means of any pit or shaft of or belonging to the mines or seams hereby demised, and sunk or made in the lands hereinbefore described, the said last-mentioned rent to be payable as and for shift rent.

And *also yielding and paying* unto the said lessor, yearly and every year during the continuance of this demise, the further rent or sum of 2s. 6d. per ton, and in proportion for a less quantity than a ton, for all coals or coke the produce of any mines or seams, other than the mines or seams hereby demised, that shall by the said lessee, in exercise of the powers in that behalf hereinbefore contained, be led or carried away, upon or over the said lands hereinbefore described, or any part thereof, the said last-mentioned rent being payable as and for surface way-leave rent, a ton of coke being for the purposes of these presents taken to consist of 733 cwt. imperial. And the said lastly-mentioned tentale rents to be payable and paid yearly on the said                      day of                      , and so that at each such

Seventh  
redden-  
dum.

day of payment the whole amount of the said respective tentale rents for the year then ended or ending shall be fully paid or satisfied. And *also yielding and paying* unto the said lessor, yearly and every year during the continuance of this demise, for or in respect of all such part or parts of the said lands hereinbefore described as shall be or shall have been by the lessee taken, used, or occupied, for pits, pit-heaps, houses, coke-ovens, brick-kilns, or other buildings, railways, or other ways or roads, or otherwise, for the purposes and by virtue of these presents, a rent or sum after the rate of £                      per acre, and in proportion for a less quantity than an acre; and the said rent to continue payable during the continuance of this demise, or until the said land shall be sooner levelled and restored, or paid for pursuant to the covenants in that behalf hereinafter contained, the lastly-mentioned rent to be payable and paid yearly on the said                      day of                      ,



a proportionate part of such rent, nevertheless, to be paid on such of the said days as shall happen next after any land shall have been taken, used, or occupied, as aforesaid. *Provided always*, and it is hereby agreed and declared, that if the said certain tentale and other rents or sums of money hereby reserved and made payable, or any of them, or any part thereof respectively, shall be unpaid for the space of thirty days next after any of the days or times hereinbefore appointed for payment thereof, then and in such case, and so often as the case shall happen, it shall be lawful for the said lessor, or his agents or servants, either immediately or at any time thereafter, not only to stop and obstruct, either at the pit or pits of the said demised mines and premises, or elsewhere in or upon any of the lands of the said lessors, or any of them hereinbefore declared, all or any of the horses, carts, waggon engines, waggon or railway machinery, and all or any other carriages whatsoever, and the drivers leading and conducting the same, from leading, carrying, or conveying of coals and coke or other things, but also to seize, distrain, and sell all or any part of the coals and coke then lying and being above ground upon the same lands, and all and singular the horses, carts, waggons, engines, and other stock and materials, goods, and chattels belonging to, or used, or provided for carrying on the said mines and premises, for payment and satisfaction of all such arrears as aforesaid, and all intermediately accruing rents (if any), together with the costs and charges to be occasioned by every such seizure, distress, and sale, rendering the overplus (if any) to the owner or owners of the goods, chattels, or things so to be distrained upon demand. *Provided also*, and the grant and demise hereby made are upon this express condition, that if the said tentale and other rents or sums of money hereby reserved and made payable, or any of them, or any part thereof respectively, shall be unpaid for the space of forty-two days next over or after any of the said several days or times hereinbefore appointed for payment of the same respectively, or if the said lessee should alien, assign, convey, set over, or underlet to any person or per-

Proviso for  
distress in  
default.

Proviso for  
re-entry.

sons whomsoever, for the whole or any part of the said term hereby granted, the mines and seams, powers, liberties, or privileges and premises hereby granted or demised, or any of them, or any part thereof respectively, or the use or enjoyment thereof, or of any of them, or any part thereof, or should attempt so to do, without the license or consent in writing of the said lessor first thereunto had and obtained, then and in such case, and although no advantage may have been taken of any previous act or default, it shall be lawful for the said lessor, either immediately or at any time thereafter, into and upon the said mines and premises intended to be hereby demised, or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy, as in his or their former estate, and the said lessee throughout and therefrom to eject, anything herein contained to the contrary in anywise notwithstanding, and thereupon this demise, and the said term of

years intended to be hereby granted, shall cease and determine, without prejudice, nevertheless, to the rights and remedies of the said lessor against the said lessee upon or in respect of any of the covenants, provisoes, or agreements herein contained on the part of the said lessee, which may be then or may have been previously broken or unperformed, or which is, or are, or ought to be, performed or observed, at or after the expiration or sooner determination of this demise. *And* the said lessee doth hereby covenant (*p*) with the said lessor, in manner following (that is to say); that the said lessee shall and will, well and truly, pay or cause to be paid unto the said lessor the said several certain and other rents and sums of money hereby reserved and made payable at the days and times and in manner hereinbefore mentioned for the payment thereof respectively without any deduction or abatement for taxes, rates, or otherwise (the lessor's property-tax only excepted). *And also* shall and will, at all times during the continuance of this demise, pay all and all manner of taxes, cesses, rates, and charges, parliamentary, parochial, or otherwise howsoever (the lessor's property-tax excepted), already or to be

Covenants

for pay-  
ment of  
rent,

taxes.

(*p*) *Ante*, p. 296.

hereafter taxed, charged, assessed, or imposed, or due, or payable, upon, for, or in respect of the mines, powers, liberties and premises hereby granted or demised, or any of them, or the occupation, use, or enjoyment thereof, or on the produce thereof, or on the rents hereby reserved, or any of them. *And also* shall and will, from time to time during the continuance of this demise, yield and deliver in manner aforesaid, such quantities of best or round coals the produce of the mines or seams hereby demised as are hereby reserved or mentioned in that behalf. *And also* shall and will, during the continuance of this demise, work, manage, and carry on the mines and premises hereby demised in a fair, proper, and orderly manner, and according to the best and most improved method of working mines and seams of the like nature on the rivers Tyne, Wear, and Tees, and so as to obtain therefrom the greatest possible quantity of coals, and shall not, nor will do, or suffer to be done, any wilful or negligent act or thing which may cause, or tend to cause, the drowning or firing of the said mines or premises hereby demised, or any part thereof, or cause, or tend to cause, any loss of coal, or which may occasion or bring any creep or thrust upon the same, or stop or obstruct any of the air-courses, water-courses, passages, or drifts thereof; and that if by reason of any act, neglect, or default, or improper mode of working or management of the said demised mines or premises, by or on the part of the said lessee, or his agents or servants, any coal therein, or in any of the seams thereof shall be rendered inaccessible or incapable of being worked, or if the said lessee should leave unwrought any barrier, bulk, or warren of coal in any of the seams hereby demised, or in any parts thereof respectively, next or adjoining to any other mines or seams whatsoever, but which barrier he is nevertheless hereby permitted and allowed to have if he should think proper so to do, the coal so rendered inaccessible, or incapable of being worked, or left in such barrier as the case may be, as aforesaid, shall be chargeable and charged with and subject to the payment of rent under and by virtue of these presents, in like manner as if it had been actually worked and brought to

For effectually working mines.



bank by the said lessee during the year or respective years in which it shall have become inaccessible or incapable of being worked, or might or ought to have been worked

Erection of  
buildings.

out of and upon such barrier as aforesaid. *And further*, that the said lessee shall not nor will erect or build any coke-ovens, or agents' or workmen's dwelling-houses, in or upon the said lands hereinbefore declared, save in such numbers and situations as the said lessor shall from time to time by writing under his hand permit or allow.

For keep-  
ing proper  
accounts.

*And also*, that the said lessee shall and will at all times during the continuance of this demise, keep or cause to be kept, full and accurate accounts, of the quantities of coals wrought, gotten, and brought to bank from and out of the mines and premises hereby demised, and from and out of any other mines and premises that may be wholly or partially wrought, drained, or ventilated by means of the powers or liberties hereby granted or demised, or any of them, and also of the quantities of coals and coke the produce of any such other mines or premises that shall be led or carried away over or upon the lands hereinbefore declared or any part thereof, by means of the powers in that behalf hereinbefore contained, specifying and distinguishing in such accounts, the quantities of coals and coke respectively chargeable, with each of the respective rates or prices per ton as tentale rents hereby made payable or mentioned, and also the respective quantities and qualities of coals hereby exempted from rent, or for or in respect whereof

Delivering  
accounts.

exemption from rent shall be claimed. *And* shall and will once in each calendar month during the continuance of this demise, make, and at his own expense deliver to the said lessor, or his agent or colliery viewer, a full and correct account (distinguishing and specifying as aforesaid) of the quantities of coal wrought, gotten, and brought to bank from and out of the mines or premises hereby demised, and also of the quantities of coals and coke respectively wrought, gotten, and brought to bank, and led away as aforesaid by the means aforesaid from and out of any such other mines or premises as aforesaid during the then next preceding

calendar month. *And also* shall and will from time to time, and at all reasonable times during the continuance of this demise, permit the said lessor or his agent or colliery viewer, to have access to the overmen's, banksmen's, and staithmen's books of presentments, drawings, and leadings, and all other books and accounts relating to the working and drawing to bank of coals out of or from the mines and premises hereby demised, or such other mines or premises as aforesaid, or to the leading of coals or coke, the produce of such other mines or premises on the lands hereinbefore declared, or any part thereof, by the means aforesaid, with liberty to take copies thereof or extracts therefrom at pleasure. *And also* that any person or persons employed by and at the expense of the said lessor, shall and may from time to time, and at any time or times during the continuance of this demise, at any pit or pits of the demised mines, or elsewhere upon any of the lands aforesaid, or at any other pit or pits wheresoever situate, where any coals the produce of the demised mines or premises hereby demised, or of any such other mines or premises as aforesaid, shall be drawn or brought to bank, take an account in writing of all or any coals wrought and brought to bank from and out of the mines or premises hereby demised, or any such other mines or premises as aforesaid, and of the quantities of coals and coke the produce of such other mines or premises led away over the lands aforesaid by the means aforesaid, and that he, the said lessee, his agents, servants, and workmen, shall and will afford to such person or persons all facilities necessary or convenient for taking such accounts. *And also* that it shall and may be lawful to and for the said lessor, or his agents, viewers, or servants (but not exceeding five persons at any one time), from time to time, and at any time or times during the continuance of this demise, without any interruption, to descend into the mines and seams hereby demised by means of any pit or shaft already or to be hereafter sunk or made in the lands hereinbefore declared, or any other pit or shaft wheresoever situate, for the time being belonging to or used by the said

Inspection  
and exam-  
ination of  
accounts.

Account  
of coal  
brought to  
bank.

Inspection  
and survey  
of mines.

lessee and communicating with the said hereby demised mines and premises, and to use the machinery, ropes, servants, and horses belonging to the said lessee for that purpose, and for safe return forth and out of the hereby demised mines and premises, to the intent to inspect and survey the same mines and premises and the workings and management thereof. *And also*, if deemed expedient, to measure or survey the same, and to use any other means for ascertaining the quantities of coals wrought throughout or remaining unwrought therein, so that such persons or viewers do not thereby obstruct the workings of the said hereby demised mines and premises, or of any other mines or seams belonging to or worked by the said lessee, more than necessity may require, and that the said lessee shall and will, if thereunto requested, cause one or more of his viewers, or other servant who may have a competent knowledge of the said demised mines and premises, or other mines and premises, to attend and assist the agents, viewers, or servants of the said lessor in making any or every such inspection, survey, and measurement as aforesaid. *And also* shall and will, during this demise, make and keep filled up from time to time, every three calendar months at the least, a proper and accurate plan of the workings in each seam of the said mines and premises hereby demised and the other mines, on which plans respectively the true position, direction, and inclination of all faults, troubles, and dykes met with or found in the said mines and premises, as well as of all drifts, outstrokes, instrokes, air-courses, and water-courses therein, shall be correctly laid down or shown, and to which plans respectively the said lessor, and his agents, viewers, and servants, shall and may from time to time, and at all reasonable times, have access, with liberty to inspect the same, and take copies thereof and extracts therefrom at pleasure. *And further*, that the corves, boxes, or tubs respectively, to be used for the drawing to bank of coals from the mines and premises hereby demised, or from any such other mines or premises as aforesaid, by the means aforesaid, and the waggons, trucks, or other carriages to be used for the loading or carrying away of coals and coke respectively, the produce of such other mines or premises over the

Keeping  
plans of  
workings.

For uni-  
formity of  
size of  
corves,  
boxes, or  
tubs.



lands aforesaid, or any part thereof, by the means aforesaid, shall respectively be made and kept of one uniform size, and that of some acknowledged and specified size or capacity, but not so that those used at any one pit or shaft need be of the same size, gauge, or capacity as those used at any other pit or shaft, and that the said corves, boxes, or tubs, waggons, trucks, or other carriages, shall not, nor shall any of them, be altered during the continuance of this demise, unless at least two calendar months' notice in writing be given to the said lessor of the intention to make such alteration. *And* that the said lessee, or his agents or servants, shall and will at all times during the continuance of this demise, weigh the contents of the said corves, boxes, or tubs, when and as they respectively shall be drawn to bank, with weighing-machines and weights to be for that purpose provided, and kept in good order and repair, by and at the expense of the said lessee, at each pit or shaft where coals shall be drawn to bank, from or out of the hereby demised mines or premises, or from or out of any such other mines or premises as aforesaid by the means aforesaid, and shall and will enter the weights of the contents of every corf, tub, or box in a book or books to be kept for that purpose by the said lessee, or his agents or servants, which book or books shall be open at all times to the perusal and inspection of the said lessor and his agents and viewers, with liberty to take copies thereof and extracts therefrom at pleasure. *And also* that the said lessor, or his agents, viewers, or servants, may from time to time, and at any time or times, as often as he shall think proper, measure and gauge the corves, boxes, and tubs, waggons, trucks, and other carriages respectively aforesaid, or any of them, and weigh the same and the contents thereof with the weighing-machines and weights to be provided and kept by the said lessee as aforesaid. *And* that if upon any such measuring, gauging, or weighing, the said corves, tubs, or boxes, waggons, trucks, or carriages, or any of them respectively, shall be found to be of too great size, gauge, or capacity, the said lessor, or his agents, viewers, or servants, may stop and hinder the same from being used until they,

Examining  
weighing-  
machines  
and  
weights.

by and at the expense of the said lessee, be reduced to the proper size, gauge, or capacity, and all corves, boxes, or tubs, waggons, trucks, or carriages found to contain, or to be of a size, gauge, or capacity for containing an excess of weight, shall be reckoned to have carried such excess for three calendar months then next preceding, unless there shall have happened a measuring, gauging, or weighing within the last-mentioned time, and then from the time of such last-mentioned measuring, gauging, or weighing, and rent shall be chargeable and paid upon such excess accordingly. *And also* that the said lessor, and his agents and viewers, may from time to time, and at any time or times, as often as they shall think proper, examine all or any of the weighing-machines and weights to be provided and kept by the said lessee as hereinbefore covenanted, in order to ascertain whether the same respectively are or is correct and in good repair and order; and if, upon any such examination, such weighing-machines, or any of them, shall be found incorrect or out of repair or order, the said lessor, or his agents or viewers, may require the same to be adjusted, repaired, and put in order by and at the expense of the said lessee; and if such requisition be not complied with within fourteen days after being made, the said lessor, or his agents or viewers, may cause the said weighing-machines and weights respectively to be adjusted, repaired, and put in order, and may recover the expense of so doing from the said lessee; but the foregoing provisions, or any of them, shall not prejudice or affect any rights, remedies, claims, and demands of the said lessor against the said lessee by reason of the said weighing-machines and weights, or any of them, being incorrect or out of repair or order. *And also* shall and will fence off, and during the continuance of this demise keep fenced off, from the adjoining lands, with a substantial wall or railing, or other proper fence or fences (q), all side portions of the lands hereinbefore declared as shall be taken, occupied, or used by the said lessee, by virtue of any of the purposes of these presents; and shall and will make and provide, and during the continuance of

Keeping  
fences,  
crossings,  
gates, &c.

this demise, maintain and repair a sufficient number of crossing-places or communications across all railways and other ways or roads made or used by virtue of and for the purposes of these presents, and other the lands so to be fenced off as aforesaid, either upon the level or over or under the same respectively, with proper gates and fastenings thereto, and stiles for the use of the occupiers of the adjoining lands, and so that the severance of such lands may cause as little inconvenience as may be to the occupiers thereof; and also shall and will erect and maintain on all such railways or other ways or roads as aforesaid if and where necessary, gates or bars, so as to preserve the enclosure of the adjoining lands and prevent trespasses.

*And also* shall and will make, and during the continuance of this demise, maintain, cleanse, and keep open and in good repair and condition, all such culverts, drains, and water-courses in, upon, and by the sides of the railways, and other ways and roads and works that may be made or used by the said lessee, for the purpose and by virtue of these presents, and through and by the sides of the fences to be by him made and maintained pursuant to the covenants herein contained, as shall be sufficient to prevent any water from running off any such railways, or other roads or ways or works, or any land taken, occupied, or used for the purposes of these presents, on to the adjoining lands.

For preventing water flowing on to adjoining lands.

*And also*, that if in or by the exercise of any of the powers and liberties herein contained, or otherwise in or by reason of the winning or working of the mines or seams of coal in or under the said lands, or any part thereof, any wells of water or watering-places, whether for domestic consumption or for the use of cattle, in the lands hereinbefore declared, shall be destroyed, or the water thereof rendered unfit for use, or if the said lessor, or his tenants, or cattle, shall be deprived of access to any such wells or watering-places, the said lessee shall and will at his own expense, in some convenient part or parts of the said lands, to be approved of by the said lessor, or his tenants or agents, make and maintain during the continuance of this demise, other wells or watering-places, and

For making wells or watering-places in lieu of damaged wells or watering-places.



Preserving  
ashes and  
manure.

keep the same effectually supplied with wholesome water. *And also* that all dung, ashes, and manure, during the continuance of this demise, bred or made in or about the said mines and premises hereby demised, or any part thereof, and at the colliery houses, stables, and other buildings belonging thereto, and for the time being standing upon the lands hereinbefore declared, shall become and be the property of the said lessor, who shall be at liberty from time to time to remove and take away the same, the said lessee drawing the underground dung and manure to and laying the same at bank by means of some pit or shaft sunk or made in the lands hereinbefore declared, if any such there be, for the use of the person or persons entitled thereto without payment or compensation for so doing, unless such dung, ashes, and manure shall be required for the use of any land which the said lessee for the time being occupy as tenant or tenants under the said lessor, in which case it shall be lawful for the said lessee to take and use such dung, ashes, and manure for such land. *And also*

For leaving  
pits and  
shafts open.

that whenever the said lessee shall leave off working or using any pit or pits, shaft or shafts, of the said hereby demised mines or premises in or upon the lands hereinbefore declared, whether at or before the expiration or sooner determination of this demise, the said lessee shall and will, upon the request of the said lessor, leave the same open, together with the deals, timber, brattices, and stoppings respectively fixed therein and underground, for the use and benefit of the said lessor; but if such request shall not be made, then that the said lessee shall and will fence round the said pit or shaft, pits or shafts, with a substantial wall not less than seven feet in height, and repair such wall when necessary, and leave the same at the end, or other determination of this demise, in good repair and condition. *And also* that the said lessee shall and will, from time to time, pay unto the said lessor, or his tenants, reasonable compensation or satisfaction, annual or otherwise, for all or any damage or injury at any time after the commencement of the said term done or occasioned to the surface of any part of the lands hereinbefore

Fences.

Compensa-  
tion for  
surface  
damage,  
and indem-  
nity to  
lessors.

declared, not actually taken, used, or occupied for the purposes of these presents, or some of them, or to any dwelling-house or other houses or buildings, or to any farm or fold-yard, or to any stacks, trees, crops, or herbage, now or hereafter for the time being erected, standing, or growing on any part of the said lands hereinbefore declared, in or by reason of the use or exercise of the powers or liberties hereby granted or demised, or any of them, whether underground or otherwise; any such compensation or satisfaction that may be claimed by the said lessor to be settled, in case of dispute, by two arbitrators or their umpire, as hereinafter provided; and also that the said lessee shall and will from time to time, and at all times, save harmless and keep indemnified the said lessor from and against all actions, suits, claims, and demands whatsoever at law and in equity, by or on the part of any tenant or tenants, or other person or persons whomsoever, for or in respect or on account of the taking, use, or occupation of any portion or portions of the said lands for the purposes of these presents, or any of them, or for or in respect or on account of any such damage or injury as aforesaid, or for or in respect or on account of the use or exercise in, within, underneath, through, over, or upon the lands hereinbefore described, or any part or parts thereof, of all or any of the powers or liberties hereby granted or demised, or intended so to be. *And also* that the said lessee shall and will at the expiration or sooner determination of this demise, yield and deliver up to the said lessor, the quiet and peaceable possession of the mines and premises hereby demised, with the appurtenances, and all such parts of the lands aforesaid, as shall have been taken, occupied, or used for the purposes of these presents, or any of them, and (as to any pit or pits, shaft or shafts, that is, are, or ought to be left open pursuant to the covenants hereinbefore contained) with the several drifts, levels, air-courses, and water-courses, air-tubes, brattices, and stoppings, and the trams, rolling, and other ways (except the sleepers, rails, plates, chairs, rollers, and sheaves thereof), belonging thereto, or used therein, or employed therewith, or which within the

Re-delivery  
and posses-  
sion of  
mines,  
lands, &c.,

in good  
repair.

For restor-  
ing lands  
damaged.

space of twelve calendar months next before the expiration or sooner determination of this demise, shall be or shall have been used or employed therein or therewith, well and effectually walled and timbered, and free, open and up-standing, well and sufficiently drained and ventilated, and in good repair and working condition, unless prevented by unavoidable creeps, thrusts, or other accidents. *And also* will, at the expiration or sooner determination of this demise, leave in good and tenantable repair (*r*), order, and condition, all such of the agents' and workmen's houses, coke-ovens, engine-houses, and other buildings, railways, waggon-ways, and other ways or roads (except the sleepers, rails, plates, chairs, rollers, and sheaves thereof), and other works, which, within the aforesaid space of twelve calendar months shall have been occupied, used, or employed by the said lessee, by virtue and for the purposes of these presents, in or upon the lands hereinbefore described, or any part thereof, for the benefit of the lessor, as the said lessor shall by a request in writing, to be delivered to, or left at the last known residence or place of business of the said lessee, require to be so left. *And also* shall and will, within six calendar months after the expiration or sooner determination of this demise, or when use or occupation thereof shall sooner cease, level, and restore to a state fit for agricultural purposes, all such portions of the said lands hereinbefore described as shall be or shall have been taken, used, or occupied for the purposes of these presents, or any of them, save and except the sites of any pits, shafts, houses, coke-ovens, or other erections or buildings, railways or other ways, or roads, or other works, which the said lessor shall request to be left for his benefit; or otherwise shall and will in lieu of such restoration, pay the value in fee simple of the same land to the said lessor; such value in case of dispute to be settled by arbitration, in manner hereinafter provided, the land so paid for nevertheless remaining the property of the said lessor. *And*

(*r*) Ante, pp. 299, 304.



*moreover* that the said lessee shall not, nor will at any time or times, alien, assign, convey, set over, or underlet, to any person or persons whomsoever, for the whole or any part of the said term hereby granted, the mines, powers, liberties, and premises hereby demised, or any of them, or any part thereof respectively, or the use and enjoyment thereof, or of any of them, or any part thereof, without the license or consent in writing of the said lessor first thereunto had and obtained; and shall not, nor will at any time during the continuance of this demise, without such license or consent as aforesaid first thereunto had and obtained, use, or cause, or suffer to be used for any purpose whatsoever, not expressly authorized by these presents, any of the pits, drifts, passages, railways, or other ways or roads, or other works to be by the said lessee made or used within, under, over, or upon the said lands hereinbefore decreed by virtue of these presents, or the powers or authorities hereinbefore contained, or any of them. *And* the said lessor doth hereby covenant with the said lessee as follows: *That* he the said lessor has full power and authority to grant this present lease in manner aforesaid, according to the true intent and meaning of these presents (*s*); *and* that it shall be lawful for the said lessee, paying the said several rents and sums of money hereby reserved and made payable at the days or times and in manner aforesaid, and performing and observing the several covenants and agreements herein contained, and on his part to be observed and performed, at all times during the continuance of this demise, peaceably and quietly to have, hold, use, possess, exercise, and enjoy all and every the said mines, powers, liberties, and premises hereby demised and granted, or intended so to be, with their respective appurtenances, without any eviction, denial, or disturbance of, from, or by the said lessor, or any person or persons whomsoever lawfully or equitably claiming or to claim by, through, under, or in trust for them or any of them.

Against  
 assigning  
 and improp-  
 erly using  
 the liberties  
 and powers.

Lessor's  
 covenants.

For title.

Quiet en-  
 joyment.

(*Covenant for further assurance, ante, p. 621.*)

Lessee  
after ex-  
piration of  
lease.

And further, that it shall be lawful for the said lessee, at the expiration or sooner determination of this lease, or at any time or times within the space of six calendar months after the expiration or other determination thereof (having first paid and discharged the several and respective rents and sums of money hereby reserved and made payable, and having performed and observed all and singular the covenants and agreements herein contained, and on the said lessee's part to be performed and kept), to do and perform the several matters and things following, that is to say: to carry away and enjoy to and for his or their own use, all such coals and coke as shall, at the expiration or sooner determination of this demise, be ready, wrought, made, and laid above bank at all or any of the then working pits or shafts of or belonging to the said demised mines or premises; and also to repair and mend the railways, waggon-ways, or other ways or roads, and the machinery erected and used thereon, as often as occasion shall require for leading and conveying the said coals and coke, but so always, nevertheless, that the same respectively shall be so placed for and until removal as to leave sufficient heap room or ground room to enable the said lessor or his next succeeding tenant or lessee to carry on the said mines with as little hindrance and interruption as possible; and also to take away to and for his own use all the live and dead stock belonging to him upon the said mines and premises, and all such houses and hovels as shall be built with deals or timber, and covered with deals, slates, or tiles, and all the engines, machinery, and materials erected, fixed, used, or being in, upon, or under any of the said lands herein-before described, for the purposes or by virtue of these presents; save and except houses, coke-ovens, and other erections or buildings of brick or stone, and the stone or brickwork of the engines and other removeable premises, or such and so many of the said excepted premises as the said lessor shall request to be left for his use or benefit; and also save and except the brattices and stoppings of timber,

To carry  
away coals.

To do re-  
pairs.

To remove  
live and  
dead stock.

Engine and  
engine-  
houses, &c.

deals, bricks, or stones fixed and placed in the shafts and under ground for the purpose of ventilating the said mines and premises hereby demised, which, so far as the same may be necessary for the further working of the same mines and premises, are also to be left standing. *Provided* Power for lessor to purchase lessee's stock and materials. *always*, and it is hereby expressed, agreed, and declared by and between the said parties to these presents, that if the said lessor, or the next succeeding tenant or lessee, shall be desirous to purchase all or any of the live and dead stock, erections, buildings, fixtures, and other things which the lessee is hereinbefore authorized and empowered to remove and take away as aforesaid, and of such desire gives notice in writing to the said lessee, or leave such notice at his last known place of business or abode in England six calendar months at least before the expiration by effluxion of time of the said term hereby granted, or within six weeks after the determination thereof by any other means, then the said live and dead stock, erections, buildings, fixtures, and other things, or such of them as shall be mentioned or referred to in or by such notice, shall not be removed or taken away, but shall (subject always nevertheless to the aforesaid right and liberty of the said lessee, to use the said railways, waggon-ways, or other ways, and the machinery erected or used thereon for leading away the resting coals and coke) be taken by the party desiring to purchase the same at a price or valuation to be fixed in case of dispute by two indifferent persons, or the umpire, one of them to be nominated in writing by or on the part of the intended purchaser or purchasers, and the other of them by or on the part of the said lessee, and the umpire to be nominated in writing by such two persons before they enter upon the valuation. *Provided* Power for lessee to determine lease. *always*, and it is hereby further agreed and declared by and between the said parties to these presents, that if the said lessee shall be desirous to surrender and give up this present lease, and the power, liberties, privileges, and premises hereby granted and demised, and to determine the demise intended to be hereby made at the end of the 3rd, 6th, 9th, 12th, 15th, 18th,



21st, 24th, 27th, 30th, 33rd, 36th, and 39th year thereof, and of such desire shall and do at least twelve calendar months previous to the end of such year, give notice in writing under his hand to the said lessor, by delivering such notice to him, or by leaving the same at his last known usual place of abode or business in England, then and in such case at the end of the year mentioned in that behalf in such notice, the said lessee having paid or satisfied the several and respective rents and sums of money hereby reserved and made payable, and which on his part ought to be, or to have been, paid, this present indenture of lease, and every covenant, clause, article, matter, and thing herein contained, and the then residue and remainder of the said term intended to be hereby granted, shall cease, and determine, and be utterly void (saving and excepting the respective covenants, clauses, and agreements hereinbefore mentioned to be done, observed, and performed after the expiration or other determination of this demise, and also saving and without prejudice to the rights, remedies, claims, and demands of the respective parties hereto and their representatives respectively against each other, for or in respect of any breach, neglect, or default of or in performance or observance of any of the covenants, agreements, or provisions herein contained, made, or committed previous to the expiration of such notice). *Provided also*, and it is hereby further agreed and declared between and by the said parties hereto, that if at any time during the continuance of this demise, or after the expiration or sooner determination thereof, any dispute or controversy shall arise between the said lessor and the said lessee touching or concerning the construction or meaning of these presents, or any of the covenants, provisoes, clauses, or conditions herein contained, or as to any other cause, matter, or thing in anywise relating to this lease, the same, as well as every other matter or thing hereinbefore expressly agreed to be settled by arbitration, shall be referred to and decided by two competent and indifferent arbitrators, one of them to be appointed in writing by or on the part of each party in difference, or of an umpire to be by the said arbitrators in like

Disputes to  
be settled  
by arbitra-  
tion.

manner appointed before they enter upon the reference, and if either of the parties in difference shall refuse or neglect to appoint an arbitrator for the space of fourteen days or upwards next after having been requested in writing so to do by or on behalf of the other party, it shall be lawful for the arbitrator appointed by such other party to appoint a second arbitrator, who shall have the same powers and authorities as to the appointment of an umpire, the reference, and the award, and, in all other respects, as if he had been appointed by or on behalf of the party so neglecting or refusing as aforesaid, and that the respective parties in difference and the witnesses may be examined on oath or affirmation, to be administered by the arbitrators, or one of them or the umpire, touching the measures in difference or any of them, and that this proviso or agreement, and any submission to reference that may be made pursuant thereto, may, on application of either of the parties in difference, be made a rule of any of the superior courts of law or equity at Westminster, and that the measures in difference, or any of them, may by such court or any judge thereof be from time to time referred back to the arbitrators or umpire, and that, although the time for making their or his award may have expired. *Provided* <sup>Further</sup> *also*, and it is hereby further declared and agreed by, and <sup>lease.</sup> between the parties hereto, that in case the said lessee shall be desirous of having a further lease of the said hereby demised mines and premises, to commence after the expiration of the term hereby granted, and of such his desire shall give notice thereof to the said lessor or his agent at any time within the first six months of the last year of the said term, he the said lessor shall and will, at the request, costs, and charges of the said lessee, immediately on the expiration of the said term hereby granted, provided the said lessee has faithfully and truly fulfilled and kept the covenants, provisoes, conditions, and agreements of this present demise, grant a new lease of the said mines and premises, to commence at the expiration by effluxion of time of this present lease, for a further term of                      years, at, under, and subject to the same rents, reservations, cove-

"Lessor"  
and  
"lessee"  
defined.

nants, provisoes, conditions, and agreements as are herein reserved and contained. *Provided, lastly*, that the heirs and assigns of the said Richard Fenwick, hereinbefore called the lessor, and the executors, administrators, and assigns of the said Alfred Wilkinson, hereinbefore called the lessee, shall be bound by and entitled to the benefit of these presents, and the covenants, conditions, and agreements herein contained, in like manner as if they had been respectively named therein throughout next after the words "lessor" and "lessee" respectively as far as the same will admit, and unless the context or the nature of the case may require a different construction.

In witness, &c.

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LEASE OF A COLLIERY AND OF THE SURFACE AND  
ADJOINING LANDS IN WALES.

*This Indenture*, made the                      day of                      , A.D. 1864, *between* Montagu Herbert Jenner, of                      , Esq., hereinafter called the "lessor," of the one part, and John Jones, of                      , merchant, hereinafter called the "lessee," of the other part, *Witnesseth* that in consideration of the several rents, sums of money, covenants, provisoes, conditions, and agreements hereinafter respectively reserved and contained, *he*, the said lessor, doth by these presents grant and demise unto the said lessee, *firstly*, *All (description of lands, with a map endorsed)* excepting and reserving out of this demise unto the said lessor all timber and other trees, wood, and underwood whatsoever, which now are or hereafter during the term hereby granted shall be standing, growing, or being, in or upon the lands aforesaid, or any of them; and, as incident thereto, full and free liberty for the said lessor and his agents, servants, and workmen, and others authorized by him in that behalf from time to time, and at all times during the said term, to fell, cut down, root up, saw, and carry away all or any of the timber and other trees, wood, and underwood aforesaid, or to work, stack, and convert the same into charcoal upon the said premises, and generally to use all ways and means neces-

Description  
of lands.

Reserva-  
tion to  
lessor.



sary, proper, or convenient for the purpose of making available the exception hereinbefore contained. And also except all rights of free warren. *Secondly, All that colliery* Description of colliery.  
 or coal mine called \_\_\_\_\_, and those beds or strata, veins, and seams of coal of every description (*t*) (including under the term “coal,” both here and hereinafter throughout this lease, cannel and all other sorts of coal) under the lands hereinbefore described, or some of them, as well unopened as opened, and all pits already sunk in any parts or part of the said lands, and all gins, engines, buildings, and erections already erected, standing, or being in or upon any of the said lands, *with full liberty* to and for the lessee Lessee's powers.  
 nevertheless under and subject to the restrictions and qualifications contained in the covenants, provisoes, and agreements hereinafter contained, to search for and pursue the said beds, strata, veins, and seams, and get, carry away, and dispose of all the coals there found, or the coke made therefrom, as hereinafter mentioned. *And* as incident thereto, full power for the said lessee and his agents, servants, and workmen, to work and use the existing pits, shafts, galleries, tunnels, levels, canals, soughs, gins, engines, and machinery, and also upon any of the said lands on the said map coloured yellow (hereinafter when referred to designated “the said appropriated lands”), to sink such and so many pits and shafts, and to drive and make such and so many galleries, tunnels, gates, headways, passages, levels, canals, and soughs, and to erect and set up such and so many engines, gins, and machines, and to make use of such other ways and means as shall be found necessary or convenient for finding, working, and winning the said beds, strata, veins, and seams, and for conducting water for working the said engines, and for draining, discharging, and carrying away water and foul air from and out of the said mines and works, and for effectually ventilating the same, according to the best and most improved methods usually practised in such undertakings. *Also full power* to use and occupy such parts of the said appropriated lands as shall be sufficient and convenient, as well for depositing

Lessee's  
powers.

and keeping the coals, stone, clay, earth, rubbish, and spoil to be raised or gotten out of the said mines, and also any coke, bricks, or tiles to be under the power hereinafter contained for that purpose made at the ovens, furnaces, kilns, or works, power to construct which is hereinafter contained, as also for any other purpose connected with working and carrying on the said mines. *Also* full power to build and set up on some part or parts, and afterwards take down and remove for the purpose of being rebuilt and reset up, and again build and set up on the same part or parts, or some other part or parts, of the said appropriated lands, such cottages, lodges, store-rooms, engine-houses, sheds, stables, or other buildings, ovens, furnaces, steam and other engines, machinery, lime, brick, and tile kilns, or other works, with such yards, gardens, and places being parcel of the said appropriated lands to be annexed to or enjoyed with such cottages and other buildings, as shall from time to time be needful or desirable for more conveniently enjoying and working the said mines and works, or for the habitation and convenience of workmen, and the accommodation of horses or other cattle employed in and about the said mines or works, or for the conversion of any of the said coals into coke, or for the conversion into lime, bricks, and tiles (to be used for the purposes hereinafter mentioned exclusively), any stones and clay hereinafter authorized to be dug or gotten, or for storing, standing, or laying utensils, implements, coal, coke, stone, lime, bricks, tiles, or produce to be respectively employed, used, or gotten in or about the same. *Also full power* in and upon some parts of the said appropriated lands, to win and get stone, and dig and get clay, to be respectively there or on some other parts of the said land made into lime, bricks, and tiles, to be used exclusively for colliery purposes, authorized by these presents, and for no other purpose. *Also*, but for the purpose of or any purpose connected with the working and enjoyment of the said mines, and the sale and delivery of the produce thereof, or the convenient exercise of any of the powers hereinbefore contained, but for no other purpose, full power

to make and maintain any railway or other ways in, upon, or over, as well the said appropriated lands as any of the other lands hereby leased not consisting of gardens nor being the lands numbered                      on the said map, and to use the same, or any other railroads, or other roads save the road hereinafter covenanted to be broken up, now being in or upon any part of the said appropriated or other permitted lands aforesaid. *Also full power* generally to the said lessee to do and use all other lawful acts and means whatever, needful, proper, or convenient for affecting the purposes aforesaid, or any object ancillary thereto, or for the due and convenient enjoyment of the privileges hereinbefore granted, but so that all the powers and privileges hereinbefore granted shall be subject to the restrictions and qualifications contained in the covenants, provisions, and agreements hereinafter contained. *Except* nevertheless and always *reserved* unto the said lessor and his bailiffs, surveyors, and agents, full and free liberty, license, and power at all or any time or times during the continuance of the term hereby granted, to enter and come into and upon the lands or grounds hereby leased, and to make use of any of the said pits, shafts, and galleries, and all machinery, gear, and apparatus whatsoever, for the time being used and employed in or about the working and carrying on of the said mines and works, or for weighing the said coals, in order to view and inspect the state and condition of the said mines and works, and also of the said machinery, gear, and apparatus, and the weighing of any coals or coke. *To have and to hold* the said lands, colliery, and coal-mine beds, or strata, seams, and veins of coal, and rights, privileges, easements, and premises unto the said lessee from the                      day of                      , 1864, for the full term of twenty-one years. *Yielding and paying* yearly, and in every year during the said term, to the said lessor, for the lands and other hereditaments first hereinbefore described, and hereby leased, the rent of £50 (*u*) of lawful money of the United Kingdom, on the 24th day of June, the 29th

Reservations to lessors.

Habendum.

Redden-  
dum.

(*u*) Ante, pp. 294, 515.



day of September, the 25th day of December, and the 25th day of March in every year by four equal portions, free from all taxes, rates, charges (including tithe commutation rent charges), assessments, and impositions whatsoever, whether parliamentary, parochial, or otherwise, already or to be hereafter during this lease imposed on or payable in respect of the same lands and hereditaments or any of them, and from all other deductions (the land-tax and landlord's property-tax alone excepted), the first portion of the said rent to fall due and be paid on the                    day of

Further  
redden-  
dum.

, 1864. *And yielding and paying yearly*, and in every year during the said term, for the colliery, mines, and minerals hereinbefore described and hereby leased, a royalty rent on each of the four days of payment on which the aforesaid rent of £    is hereinbefore reserved, equal to one full and clear twelfth part of the price for which every ton (or smaller quantity than a ton) of coals from out of the said colliery and coal mines, and every ton (or smaller quantity than a ton) of coke made therefrom, severally actually sold during the quarter of a year ending on the quarterly day of payment for the time being, shall have been sold at whatsoever time or times the same coals may have been gotten, or the said coke made, and whether during the same quarter or any prior quarter or quarters, and either before or after the date of these presents, the same royalty rent to be paid in lawful money of the said United Kingdom, and free from all taxes, including property-tax, rates, charges, assessments, and impositions whatsoever, whether parliamentary, parochial, or otherwise, already or to be hereafter during this lease imposed on or payable in respect of the same colliery or coal mines, and from all other deductions whatsoever, and the first portion of the said royalty rent to fall due and be paid on the                    day of

Proviso for  
distress.

, 1864. *Provided always*, and the said lessee doth hereby grant to the said lessor, that in case any of the rents hereinbefore reserved or made payable shall be in arrear, in part or in the whole, by the space of twenty-one days next after the same shall become due, according to the respective reservations thereof hereinbefore contained, then, and in every such case, it shall be lawful to and for

the said lessor (under the present power, and as a cumulative remedy) to stop or hinder the loading and sending of any coals or coke from off the said premises, and to distrain all and every or any of the said coals or coke on the said premises, and all the horses, waggons, carts, gins, engines, machinery apparatus, implements, or utensils whatsoever used in and about the said works and premises, and also all goods and chattels whatsoever of the said lessee being on the said lands and premises, and the distress and distresses then and there found, to take, load, and carry away, detain, manage, sell, and dispose of in like manner as landlords are by law authorized to do with distresses for rent in arrear, to the intent that thereby and therewith, or otherwise, the said lessor may be fully paid and satisfied the rents or rent in arrear, and all costs and expenses occasioned by the non-payment thereof at the time at which the same became due, according to the reservation thereof hereinbefore contained (v). *And* the said lessee hereby covenants (w) with the said lessor in the manner following, that is to say, *that he*, the said lessee, will and shall well and truly pay, or cause to be paid, unto the said lessor the rent of £ , and also the royalty rent hereinbefore severally and respectively reserved and made payable, on the several days and in the manner hereinbefore appointed for payment of the same severally and respectively. *And also* shall and will, at all times during the said term, pay and bear all and singular the taxes, rates, charges (including tithe commutation rent-charges), assessments, and impositions, from which the said several and respective rents are hereinbefore severally and respectively reserved clear and free, and save harmless the said lessor from and against the same and all claims and demands occasioned by the non-payment thereof. *And also* that the said lessee will and shall keep at all times during the said term, upon some convenient part of the premises hereby leased, a counting-house for the said colliery; also one or more proper, correct, and sufficient weighing-machine or machines of the most approved construction, and will and shall cause to be weighed by means of the said machine

Covenants  
by lessee.

Payment  
of rents.

Taxes.

To provide  
a counting-  
house and  
weighing-  
machines.

(v) Ante, p. 635.

(w) Ante, p. 296.

or machines the coals as well already raised, but neither sold nor weighed, as from time to time to be raised out of the said mines, and also the coke as well already produced, but neither sold nor weighed, as from time to time to be produced from any of the said coals, and such coals and coke to be weighed as aforesaid, if already raised or produced, as soon as reasonably can be after the execution of these presents, and if not already raised or produced, when and as the same shall from time to time be respectively raised and produced, and will and shall cause all the said coals and coke where not sold when and as raised to be again so weighed when and as the same shall from time to time be sold, and will and shall permit the agent of the said lessor to be present at any and every such weighing.

Books and  
accounts.

*And also* will and shall at all times, during the said term, keep or caused to be kept at the counting-house of the said colliery, proper books in some of which shall be entered fairly and legibly from day to day full, true, particular, and intelligible accounts of the following matters, viz.: 1. The quantity and description as well of all coals and coke already and to be raised and produced, as of all such stone and clay raised and to be raised as shall be converted into lime and bricks or tiles respectively; 2. The sales and deliveries which, since the      day of      , 186      , have been, or from time to time shall be, made of the said coals and coke, the times thereof respectively, and the names of the purchasers; 3. The produce of such sales; 4. The purposes for which such lime and bricks or tiles were made, and the mode, time, and place in and at which they were employed; also accounts of all other particulars calculated to elucidate the measures aforesaid, and in others of which said books shall be fairly and legibly made faithful and just entries of all sinkings of pits, drivings of levels, borings, and workings out on the said premises, describing therein the particulars of such in a regular and technical manner.

Plans and  
sections.

*And also* will and shall at all times, during the said term, keep and have forthcoming at the counting-house aforesaid accurate and intelligible plans and sections of the coal-mine beds, strata, veins, and seams hereby leased, and of all pits,



shafts, galleries, levels, dykes, and other matters connected therewith, so as to exhibit the progress and actual state of the workings of the said mines; which said books, plans, and sections shall be at all times accessible to and open to the inspection and examination of the lessor and his agents for the purpose of casting up the accounts, and of making copies or abstracts of the said books and plans or extracts therefrom, or verifying any copies or abstracts of or extracts from the said books and plans. *And also* that the said lessee will and shall, on each and every of the quarter-days hereinbefore appointed for payment of rent, at his own expense, make out and deliver to the lessor or his agents a correct copy of the said books of account for the then last preceding quarter of a year, accompanied with an abstract or summary thereof, so framed as to show the amount of royalty rent payable for that quarter. *And also* will and shall at all times, at the request and expense of the lessor and his agents, make out and deliver to the same person or persons making such request copies, abstracts, and extracts of and from the said books, plans, and sections. *And also* that the lessee will and shall sell, and that at the best price which according to the nature and quality thereof can be had for the same, all the coals and coke as well already raised and produced as aforesaid but not sold, as those shall be so raised and produced as aforesaid, save only such coals as have been or from time to time may be converted into coke, and such coals and coke as shall from time to time be required and used for the purpose of working the engines, or in making any bricks or tiles, or in converting any limestone into lime, to be severally used during the said term in any of the works or for colliery purposes within, upon, or under any of the aforesaid lands and premises; *and also* except all the coals required for consumption, and actually consumed during the said term hereby granted in the houses or habitations, and for the private domestic use, convenience, or necessity of all or any of the agents, workmen, servants, or labourers for the time being employed in and about the said colliery or works, or any of them, so that the quantity of such last-mentioned coals do

Sale of  
coals and  
coke.

not exceed that usually allowed for similar purposes at other collieries in Anglesea and Carnarvonshire, nor exceed in any case or on any account                      tons in any one year.

For effect-  
ually  
working.

*And also* that the lessee will and shall, during the term hereby granted, in all respects work the coal mines and coals hereby demised in a fair, orderly, efficient, skilful, provident, and proper manner, according to the most approved method of working collieries in Anglesea and Carnarvonshire, and without any voluntary intermission or unnecessary loss of time, and so as to render the same as productive of royalty rent as circumstances will permit, and without any unnecessary waste, and with as little damage to the surface or the buildings thereon as is reasonably possible.

*And* in particular will and shall carry on and use the Longway system of working the said coal whenever and wherever such mode of working shall be practicable. *And* will and shall sink as few and as deep pits as possible for reaching and working the coal, and will and shall work the deep coal first, and will not, nor shall on any account whatsoever, open shallow works in the bassetts of the said coal.

Drains.

*And* will and shall at all times during the term hereby granted keep the mines hereby leased well and sufficiently drained and ventilated, and cause all pumping-shafts and water-hods to be lined with stone or bricks in a sufficient and workmanlike manner, according to the best and most approved mode of completing the same, and cause all pits and shafts already or to be hereafter sunk or made, to be well, effectually, and by durable means secured and

Fences.

kept open and fenced (*x*) round by sufficient walls. *And also* will and shall in working the coal-mine beds and strata seams and veins hereby leased, keep and leave unwrought in every seam of coal, a barrier (*y*), bulk, or warren of whole coal of at least five yards in breadth or thickness in every part next to or adjoining the estates or lands of other persons, and will not nor shall cut through or in any way perforate the same without the previous consent in writing of the lessor, or his agents duly authorized. *And further* will and shall, during the said term of twenty-one years,

(*x*) Ante, pp. 213, 262, 547.

(*y*) Ante, p. 438.

engage, keep in pay, and employ an experienced and skilful agent, to be approved of by the lessor, to conduct the works, and also not less than able-bodied miners engaged without intermission, except while prevented by inevitable accident, in working the mines, and sink, erect, make, and maintain all necessary or proper pits, shafts, galleries, levels, adits, buildings, engines, machinery, tackle, and gear, and provide and employ proper and sufficient horses, cattle, carriages, tools, utensils, and materials, in order that the works may be carried on and followed up during the said term skilfully and with unabated vigour, and that all engines, machinery, and implements to be hereafter introduced on the premises shall be of good workmanship and materials and of a modern character. *And also* will and shall cause to be properly laid aside in heaps for the lessor, all the earth and soil which shall be dug up in the working of the said mines. *And* will not, nor shall wilfully or negligently do, or suffer, or omit any act or thing the commission or omission of which shall or may produce, or occasion, or tend to produce the drowning of any of the said mines, or the destruction or loss of or any damage to the coals therein. *And also* that the working of the said mines and all the mining operations authorized by these presents, shall take place and be carried on under the inspection and superintendence and subject to the control of the lessor, his steward, bailiff, or surveyor. *And also* that the lessee shall and will at all times when the said mines shall be in work, cause to be conveyed gratis from the surface down into the said mines, and through them, and thence back again and up to the surface, by means of the machinery and apparatus, the lessor, his steward, agent, nominee or nominees, for the purpose of surveying and inspecting the said mines and works, and ascertaining whether the same are kept in good and proper repair, order, and condition, and are being worked and carried on in the manner hereinbefore specified in that behalf, and according to the true intent of these presents, or not, and will and shall give to him or them such explanations touching the said mines as shall be requisite in that behalf; and that in

Agents.

Certain  
number of  
workmen.

Machinery.

Preserving  
earth.Drowning  
mine.Power to  
survey and  
inspect.



case on any such survey it shall be found that any of the said mines and works are not in good and proper repair, order, and condition, or are being worked or used in an unfair, irregular, unworkmanlike, improvident, or improper manner, then, on a notice in writing thereof from the lessor, or his steward or agent for the time being, given to the lessee, the said mines and works shall forthwith be put into good and proper repair and condition, and the inculcated mode of working or using the same be discontinued, and the right mode adopted, or should the terms of the notice require it, the further working of the said mines shall be suspended until full satisfaction and amends shall have been made for the damage or injury sustained, or occasioned by or to the lessor, through or by reason of the said mines and works having been so worked or used in an unfair, irregular, unworkmanlike, improvident, or improper manner. *And also* that the lessee will and shall as often as the pits or shafts sunk shall by reason of the exhaustion of the veins or seams of coal become useless, fill up the same pits or shafts, or, at the election of the lessor, arch over the same with bricks in a substantial and secure manner, burying therein the spoil and rubbish which shall have been raised or gotten out of the said pits or shafts, and in either case cover the mouths of the said pits or shafts with good earth or soil. *And* at the same time level the land immediately surrounding the said pits or shafts, and break up, and level, and cover with good soil the surface of any roads used in connexion with and become unnecessary by the disuse of the same pits or shafts, so as to render the surface of the said pits or shafts, and of the land and roads connected therewith, fit for tillage and cultivation. *And* will or shall when and as any erections, buildings, engines, furnaces, machinery, ironwork, or other apparatus already or to be erected, built, constructed, or fixed by the lessee in or upon the said appropriated lands shall be taken down and removed, in like manner, break up, level, and cover with good soil the surface of the sites thereof, and level the surface of the land immediately surrounding the same, and break up, level, and cover with

Filling up  
pits, shafts,  
and sur-  
face.

good soil the surface of the roads used in connexion with but become unnecessary by the taking down and removal of the same so as to render the said sites, land, and roads fit for tillage and cultivation. *And further*, that the lessee will and shall cultivate such part of the lands hereby leased as are or heretofore usually have been in or are intended for tillage, in and according to the following rotation of crops; that is to say, he will not nor shall take therefrom more than two crops of corn in five years, nor these otherwise than in and under the following order and qualifications—viz. the first of the said crops of corn to be followed in the next succeeding year by a green crop, well manured and kept free from weeds, and in the year immediately next following shall come the second crop of corn, which is to be laid down with clover and seeds, and the said second crop shall be followed in the next succeeding year by a crop of hay, and after that and in the year next following by clover or grass fed off. *And also* that the lessee will not nor shall at any time or times sell, or dispose of, or carry away any hay, grass, straw, fodder, or stubble which shall at any time or times during the said term grow upon or be produced by or on the said premises, or any part thereof, but will and shall spend the same upon the said premises. *And also* will and shall duly and regularly lay and spread abroad upon such parts of the said premises as shall most need the same, all the dung, compost, and manure which shall from time to time be made upon the said premises, and at the expiration or sooner determination of the term will and shall leave in heaps on some convenient part or parts of the premises, for the benefit of the lessor, and without being paid for the same, so much of the same dung, compost, and manure as shall not have been so laid and spread. *And* will not nor shall plough up or convert into tillage any part of the pasture land, nor mow the meadow land oftener than once in any year, nor take therefrom two crops in two consecutive years, without manuring or irrigating the same in one of those years, nor mow any part not mown previously within a period of ten years, and generally that the lessee will and shall manage,

For cultivating some of the lands.

till, cultivate, and use all the lands hereby leased and not required for the mining purposes hereinbefore authorized, in a due and regular course of good husbandry, so that the same shall not be in anywise injured or deteriorated, but improved. *And* will not nor shall cut down, root up, fell, top, shred, or damage, or through negligence allow to be shred or damaged, by cattle or any other means, any tree, sapling, or underwood, for the time being growing, or being upon the land hereby leased, nor commit, nor suffer to be committed any waste, spoil, or destruction upon any of the premises hereby leased. *And also* that the lessee will and shall, from time to time, and at all times during the said term, well and sufficiently repair, amend, maintain, sustain, fence, dress, cut, scour, cleanse, keep free from weeds, and preserve in good and sufficient order and repair, and in due and proper course of working, all and singular the premises hereby leased, together with all houses, buildings, and sheds used for agricultural purposes, all hedges, fences, pales, gates and stiles, roads, ways, drains, water-ditches and other ditches, ponds, water-courses, and sluices, in, upon, or belonging to the said premises, or any part thereof; together also with all the buildings, engines, machinery, railways, or roads of every description, and other conveniences which now are or during this lease shall by the lessee be erected, set up, constructed, or made for winning and working the said mines, beds, seams, and veins of coal, or otherwise carrying on the said colliery works, provided this covenant shall not extend to prevent the lessee from pulling down and erecting elsewhere on the premises any buildings, engines, or machinery erected or to be erected by him for colliery purposes, power to take down and remove which is hereinbefore given to him by these presents, or from substituting new engines, machinery, or implements proper and sufficient for the due and proper working of the mines for others before there. *And* in particular the lessee will and shall cause all drains and ditches to be cleared out at least every two years. *And also* that the lessee will not, nor shall make, or cause to be made any roads, paths, or tracks, except such as shall be necessary or

Repairs.

Drains.

Roads.



convenient for the due use and cultivation of the said lands, or for the due use and working of the mines aforesaid, nor these without the previous consent in writing of the lessor, or his steward or agent; nor shall nor will use any such roads, paths, or tracks if or when made, or any existing road, path, or track, save only for those purposes, and for no other purpose whatsoever. And will within one calendar month from the day of the date hereof break up, or cause to be broken up, the road or track marked A. B. in the said plan in the margin of the first skin of these presents, and cease to use the said road, or any other road or track across or over any of the lands hereby leased, as a way to the coal mine belonging to the Right Honourable the Earl of

, known as the coal mine. *And that* Power of entry and repairs.  
 it shall be lawful for the lessor or his agents at all reasonable times during the term hereby granted, to enter into and upon the houses, buildings, lands, and premises hereby leased, to examine and ascertain the state of the repairs and cultivation and general condition thereof, and of all such wants of reparation, defaults, and defects, as upon any and every such view shall be discovered in or upon any parts or part of the premises contrary to the covenants hereinbefore contained of the lessee, to give notice to the lessee, and that the lessee will and shall within three calendar months, or within a shorter time, if the urgency of the case shall so require, next after any and every such notice so given, well and sufficiently repair, amend, or remedy every such want of reparation, default, or defect specified or mentioned in such notice, according to the exigencies and true intent of the same notices. *And further*, that it shall be lawful for the lessor, with or by his attendants, servants, or other persons authorized by him in that behalf, to have the sole and exclusive right of hunting, hawking, and fowling, and pursuing and killing game upon the said premises, and fishing in the waters of or adjoining the same, at his or their free will and pleasure, at all reasonable times of the year during the said term, and to carry away the game, beasts, wild-fowl, and fish thus destroyed Hunting and fishing reserved.

Against  
assigning.

Powers of  
lessor  
during the  
last year.

Setting out  
coals for  
lessor.

or taken, and that the tenant will and shall warn off all other persons sporting or trespassing in search or pursuit of game on the premises hereby leased, and inform the lessor of the names and addresses of all such persons, and permit the name of the lessee to be used by the reversioner in all such proceedings as the lessor shall be minded to take, against all or any such persons, being first indemnified against all loss, costs, charges, and expenses to be occasioned by any such proceeding; and will not nor shall do or suffer any act or thing whereby or by means of which such proceedings may cease, fail of effect, or be delayed. *And also* that the lessee will not nor shall, without having first obtained the consent in writing of the lessor, assign over or underlet, or in any manner part with the possession of all or any part of the lands, colliery, mines, and premises hereby leased, or deposit with any one by way of mortgage or lien this present indenture. *And also* that the lessee will and shall permit the lessor, in the last year of the term, to sow grass seeds with any spring corn which it may then be in the course of cropping to sow, and will and shall properly harrow in the said seeds, and will and shall permit the lessor to take the hay, together with the green crops growing on the said premises at the end of the said term at a price or prices to be fixed by two impartial practical valuers, to be chosen, one by the lessor and the other by the lessee, or in case of the disagreement of such valuers, by a third person of their nomination, such price, as respects the hay, to be its market value at , less the cost of carriage there, and less the value delivered on the said premises of as many loads of good stable dung as there shall be loads of hay, and as respects the green crops to be their value to be consumed on the said premises. *And also* that the lessee shall, one calendar month before the expiration of the term, set out for the lessor one equal twelfth part of all the coals and coke then resting or lying unsold on the premises, in lieu of the royalty rent which, had the whole thereof been sold, would have been payable to the lessor for the same, and thenceforward set out for the lessor a like part of all the coals and coke which shall, before the

expiration of the term, be raised or made upon the premises and not sold in lieu of the similar rent; and will and shall bank up separately all the coals and coke which shall be so set out in such manner as to keep the surface around the pits of the colliery free and clear, and so as not to obstruct or hinder the operations of an entering tenant in screening and depositing his coals. *And also* will and shall, before the expiration of the said term, remove from the premises hereby leased, all the residue of the said coals and coke, and all the tenant's fixtures which shall not be required by the lessor to be sold to him under the power in that behalf hereinafter contained; *and* level the surface of, and cover with good soil, and reinstate as nearly as may be, such of the said lands, hereby leased, the surface whereof shall have been broken, disturbed, or covered by reason or means of the working or carrying on of the said mines and works, and render the same fit for tillage and cultivation. *And further*, that the lessee shall, at the expiration or sooner determination of the term, if the lessor shall by notice in writing require him so to do, sell to the lessor all or any of the engines, machinery, tools, utensils, tram-plates, trade-fixtures, and implements used or employed by the lessee in or about the working of the mines or carrying on the colliery, which at the time of such requirement shall be in, upon, about, or belonging to the premises or any part thereof, and shall be specified or mentioned in such notice upon being paid for the same, the price at which they shall be valued by arbitration, in manner hereinafter provided in case the parties differ about the same; provided that if such sale is required to be made on the expiration of the term, such requirement be notified to the lessee by or on behalf of the lessor three calendar months before the expiration of the term. *And lastly*, that the lessee will and shall, at the expiration or sooner determination of the term, peaceably yield up to the lessor the messuages, buildings, lands, colliery, and premises thereby leased, save in so far as the beds, strata, veins, or seams and minerals shall have been exhausted or diminished by virtue of the works carried on under these presents, with the shafts, pits, galleries,

For removal of coals and coke, and fixtures.

To level the surface.

For selling machinery and effects at a valuation.

For yielding up possession.



levels, drains, soughs, water-courses, roads, ways, and other conveniences belonging to the said colliery (the tram-plates and other ironwork appertaining to any of the said roads or ways, and not purchased by the lessor, excepted), in good and sufficient repair and condition (z), and in due and proper order and course in all respects,—the said lands hereby leased being in a due and regular course of husbandry and cultivation, and such as shall be consistent with the terms and restrictions in that behalf aforesaid, and the ungotten and unexhausted mines being in a due and regular course of working according to the most approved practice of good miners, and well drained and ventilated, and in good order for the future prosecution thereof,—there being left in the pits which shall then be in work a sufficient quantity of unwrought accessible coal to serve and supply the usual sale of the colliery during the space of                    months, if there shall be so much of such coal remaining in the same pits, and the disused pits or shafts being filled up or arched over and secured, and the disused and unnecessary roads broken up, and the surface both of the same pits, shafts, and roads, and of the other lands or grounds (the surface whereof shall be broken, disturbed, or covered by reason or means of the working and carrying on of the said mines and works) properly levelled and covered with good soil, and reinstated and rendered fit for tillage and cultivation, pursuant to the covenants of the lessee in that behalf hereinbefore contained. *And* the lessor hereby covenants with the lessee in manner following, that is to say : (*Covenants for title, quiet enjoyment, and further assurance, ante, pp. 621, 647.*) *And further*, that it shall be lawful for the lessee, in accordance with the custom of the country in this behalf, to hold over and keep possession of the barns on the said premises until the day of                    next after the expiration of the said term, for the purpose of thrashing out and disposing of the corn and grain the produce of the said premises hereby leased. *And also* that the lessor will and shall at the end of the said term pay to the lessee the value of the hay and green

Covenants  
by lessor.

(z) *Ante*, pp. 299, 304.

crops then being on the said premises, such value to be fixed as aforesaid, in case the parties differ about the same.

*Provided always*, and it is hereby declared and agreed, that if it shall happen that either of the yearly rents hereinbefore reserved shall be behind or unpaid, in the whole or in part, by the space of thirty days next after any day whereon the same ought to have been paid as aforesaid (having first been demanded, and either upon or at any time after such thirtieth day), or if the lessee shall become bankrupt, or shall assign his estate, or effects, or any part thereof in trust for his creditors, or shall compound for the payment of his or their debts, or if any execution shall be levied on his goods and chattels, or if he shall break or not keep any covenant hereinbefore contained, on his part to be performed or observed, it shall in any one of the cases aforesaid be lawful for the lessor into and upon the premises hereby leased, or any part thereof, in the name of the whole, to re-enter, and the same to have again and enjoy as in his former estate; but without prejudice to any and every other right or remedy then already accrued to him by virtue of these presents, anything hereinbefore contained to the contrary notwithstanding. *And it is hereby declared that all notices required by these presents to be given to the lessee shall be deemed to have been given to him accordingly, if they respectively shall have been left for him at the counting-house of the colliery, or shall have been affixed upon some conspicuous part of the premises hereby leased.*

(Insert clauses for obtaining a further term; also for referring matters in dispute to arbitration; and for defining the terms "lessor" and "lessee," as at pages 650-652.)

*In witness, &c.*

## LEASE OF QUARRIES OF LIMESTONE AND OF LANDS.

*This Indenture*, made the                      day of                      , 1864,  
between the Right Hon. Gertrude Lady                      , of  
                    , of the one part, and Charles Johnson, of  
                    , merchant, of the other part, *Witnesseth*,

Description  
of lands.

Lessee's  
powers.

that in consideration of the rents, royalties, and covenants hereinafter reserved and contained respectively on the part of the said C. J. to be paid and kept, the said Gertrude Lady (hereinafter called the lessor) doth by these presents grant and lease unto the said C. J. (hereinafter called the lessee), *All* that piece or parcel of land situate in the parish of Llandona, in the county of Anglesey, and containing altogether about , be the same more or less, bounded by the sea-coast towards the , and surrounded by other lands of the said lessor on all other sides, and more particularly described and delineated in the map drawn in the margin of the first skin of these presents, the extent or limits thereof being thereon distinguished by the red line drawn around the same. *Together* with full power and authority for the said lessee, and his agents, servants, workmen, and others by him or them authorized in that behalf, to quarry (*a*), work, and bring to the surface, or to excavate or otherwise obtain, the limestone, or limestone rock, lying beneath the said piece of land within the limits aforesaid, and such limestone to crush or burn into lime, or otherwise make merchantable, and subject to the reservations, covenants, and conditions hereinafter contained, to take away and dispose of. *And* for the purposes of these presents, in, under, upon, through, over, or along the said piece or parcel of land within the limits aforesaid, to make or sink any quarries, pits, shafts, or excavations; *and also* to make, erect, remove, and re-erect and repair any bridges, quays, jetties, wharfs and banks, cottages, stables, sheds, kilns, steam and other engines, crushing-mills, or works and machinery which may from time to time be required for all or any of the purposes aforesaid. *And* full liberty of ingress, egress, and regress, way and passage, at all times for the said lessee and his agents, workmen, servants, and others by him or them authorized in that behalf, with or without horses, waggons, carts, carriages, and other means of transport, implements, utensils, gear, and materials of every description, by the existing or accustomed roads or way, or any other roads,

(*a*) Ante, p. 143.



tramroads, rail, waggon, or other ways to be hereafter constructed by the said lessee without any hindrance or molestation of or by the said lessor, *except and reserved* unto the said lessor all seams, veins, beds, and substrata, ores, metals, minerals, and other profitable substances (save limestone and limestone rock), and all clay, marl, gravel, and other earth within or under the last-mentioned land, and, as incident thereto, full liberty either with or without her agents, servants, and workmen, and others, by her duly authorized in that behalf, at all times to search for, work, win, and dress, make merchantable and warehouse, or in any other way stow and leave upon the said lands, or remove by any means therefrom, the said excepted minerals, and to do all acts and use all ways and means necessary, proper, or convenient for executing the purposes aforesaid, with due and reasonable efficiency, but not so as in the exercise or enjoyment thereof, to obstruct the said lessee in the exercise and enjoyment of the powers hereinbefore granted to him. *And also except and reserved* unto the said lessor an uninterrupted right of way and passage at all times hereafter for herself and her tenants, under-tenants, agents, servants, workmen, and others by her duly authorized, with or without horses, beasts, cattle, carts, or carriages, across, through, over, and along all or any roads or ways for the time being used upon and through any parts or part of the said piece of land hereby leased at her free will and pleasure, as well for the due and convenient occupation and enjoyment of any lands adjoining as for making available the mining powers hereby reserved. *And also except and reserved* unto the said lessor full liberty by herself, or by or with her tollers, agents, servants, workmen, and others, by her respectively in that behalf authorized, either for the purposes of the mining powers hereby reserved, or for any other lawful purpose, at reasonable and convenient times to descend or otherwise enter into all workings in or under the said piece of land hereby apportioned and leased, and use the shafts, or other workings, machinery, and gear of the said lessee for the time being in or about the said hereby demised premises. *To have and to hold* the said piece or Reservations to lessor of all other ores. Habendum

Redden-  
dum.

parcel of land, and the limestone and limestone rock and premises hereby demised, unto the said lessee for the full term of twenty-one years, commencing from the       day of       , *Yielding and paying* (b) yearly and every year during the said term unto the said lessor, for the surface of the said lands and premises hereby leased, the rent of £       sterling by four equal quarterly payments, free from all deductions whatsoever, parliamentary, parochial, or otherwise (the landlord's income or property tax only excepted), the first payment of the said rent to become due and be made on the       day of       . *And also yielding and paying* yearly, and in every year during the said term, unto the said lessor, for and in respect of the powers of quarrying and obtaining and removing limestone and limestone rock, and other the powers and authorities hereinbefore described and hereby leased, the sum of 1½d. per ton for every ton (to be fairly weighed pursuant to the covenants hereinafter contained) of limestone or limestone rock which shall from time to time be raised or gotten by quarrying, excavating, or otherwise from and out of the said piece or parcel of land and premises, to be paid on the surface of the said land hereby leased immediately after the weighing of such limestone and limestone rock as aforesaid, and at least once in every three calendar months in each year, and clear and free of, and from all present or future taxes, rates, assessments, charges, and deductions, whether parliamentary, parochial, or otherwise (the landlord's income or property tax only excepted). *And also* from time to time during the said term, as often as at the end of any year terminating on the       day of       , the monies actually paid under these presents during that year in respect of the rent or royalty of 1½d. per ton hereinbefore reserved, shall not amount to the sum of £20 sterling, *yielding and paying* to the said lessor, upon the day so terminating each such year, a sum of money of such an amount as, together with the monies so paid during that year in respect of the reservation last aforesaid, will make up the full sum of £20, and every sum of money to become

(b) Ante, pp. 294, 515.

payable under this reservation shall be paid, free from all deductions, for or on account of any taxes, charges, rates, assessments, or impositions, or any other cause or thing whatsoever (except the landlord's property or income tax).

*And* the said lessee hereby covenants (c) and agrees with the said lessor that he, the said lessee, will and shall during the said term hereby created, well and truly pay unto the lessor the said several yearly rents, or sums of money hereinbefore reserved and made payable on or at the days or times and in the manner hereinbefore appointed for payment thereof, respectively free from all charges and deductions whatsoever, except as aforesaid. *And* will and shall accordingly, at his own costs and charges, from time to time, as often as 1600 tons of limestone or limestone rock shall have been excavated or obtained from and out of the said land and premises, and at least once in every three calendar months respectively of each year fairly weigh upon some convenient part of the surface of the same land, all the limestone or limestone rock for the time being raised, excavated, or obtained in, upon, or under the same land, and not previously accounted for to the lessor. *And* will and shall give ten days' notice at the least to the lessor, or her known agent or toller, at the known residence or office for the time being of such agent or toller, of the day, hour, and place when and where every such weighing will be made, in order that she may be present or represented thereat, and take part in the same. *And also* will not on any account, or for any purpose, remove or take away from the said lands, or crush, or burn into lime any of the said limestone or limestone rock, or suffer the same to be removed, crushed, or burned by any other person or persons whomsoever, until the same shall not only have been so fairly weighed as aforesaid, but until the rent or royalty hereby reserved in respect thereof shall have been so paid as aforesaid. *And also* that all the weights, beams, and scales used by the said lessee for the purposes aforesaid, shall be in all respects fair. *And also* that the said lessee will and shall pay and bear all tithes, or rent charges in lieu of tithes, and

Covenants  
by lessees.

Payment  
of rents.

To weigh  
limestone.

Payment  
of taxes.

(c) Ante, p. 296.



Power of  
distress.

all taxes, rates, assessments, and charges whatsoever, whether party, parochial, or otherwise, in respect of the premises hereby leased (the landlord's property and income tax alone excepted). *And further*, that in case any or either of the rents hereinbefore reserved, or any part thereof, shall not have been paid by the space of twenty-eight days next after any day or time hereinbefore appointed for the payment of the same, or in case any limestone or limestone rock shall have been weighed, crushed, or burnt into lime, or removed without such prior notice having been given to the lessor, or her agent or toller as aforesaid, then in any such case, and although no demand shall have been made of the rent for non-payment of which such entry may be made, should the same have been made on that account, it shall be lawful for the lessor to enter upon and into the premises hereby leased, or any part thereof, and to seize all the limestone and limestone rock, and lime, engines, machinery, goods and chattels then and there found, or any part thereof, and whether in any waggon, cart, or other carriage, or vessel laden or in course of being laden therewith. *And* either to detain the same upon some part of the said quarries and premises, or the adjoining lands, until the unpaid rent or royalty (should such entry and seizure have been made in respect of the non-payment thereof) shall be paid, or until the limestone or limestone rock, and lime so weighed, crushed, and burned without such prior notice as aforesaid (should the entry and seizure have been made on that account), shall have been weighed at the expense of the said lessee in the presence of the lessor, or her known agent or toller, and until in either case all the costs, charges, and expenses of and attending such seizure and detention shall have been paid. *And also* that the said lessee will and shall conduct the quarrying of the said limestone and limestone rock hereby leased in a skilful, workmanlike, fair, careful, and tenantlike manner, and raise and get in each quarter of a year during the said term, as large a quantity of limestone or limestone rock as reasonably can be consistently with the rules and practice of good quarrying and a due regard to the interests of the

For effect-  
ually  
working  
the quar-  
ries.

lessor. *And* will and shall at all times during the said term, well and sufficiently repair and uphold all kilns and other buildings which shall have been erected or set up in or upon, or shall be requisite to be maintained for the use of the said quarry, or any purpose connected therewith, or with the workings thereof, and all engines, machinery, utensils, buildings, and fixtures in, upon, or about the same in a proper course of working and state of repair. *And* in particular, will and shall well and sufficiently secure and keep open and support with proper timber and fixed stemples and props, or other effectual and durable ways and means, shafts, excavations, and other workings, which shall be driven, sunk, or made on the said lands within the limits aforesaid, and shall for the time being continue to be material or useful for the proper and efficient working of the said quarry. *And also* will and shall forthwith erect, and all times during the said term of twenty-one years, at his own expense, constantly repair and maintain a sufficient fence (*d*), with proper gates around the said piece of land hereby leased, for the protection of man and beast against damage or injury by reason, or means, or in consequence of any shafts, pits, quarries, or excavations which may be made or opened by the said lessee, or by any one under his authority, or of any other matter or thing which may be done by him or them upon, within, or under the said land and premises. *And also* shall and will during the said term, keep upon some convenient part of the said premises proper books of account, and make therein, from day to day, full, true, particular, and legible entries of the workings of the said quarry or quarries, and the quantity, size, weight, or measurement and quality of the limestone or limestone rock raised or obtained therefrom, and containing all particulars of dates, facts, and circumstances, necessary or proper for ascertaining the amount of the rents which shall from time to time become payable by virtue of these presents. *And* will at all times during the said term permit the lessor and her agents to have free access to the said books of account, to inspect, examine, and make extracts,

For repairs.

Fences.

Accounts.

(*d*) Ante, pp. 213, 262, 547.

or copies of or from the same. *And also* will, at least once in every three calendar months, during the said term, or oftener if more convenient to the said lessee, render at his own expense to the lessor or to her agent or toller, a true and particular account of all limestone and limestone rock raised, quarried, excavated, or obtained from the said land and premises hereby leased, and crushed, and burned into lime, and made merchantable, since the last preceding account, if any, and of the quantities, weights, or measurements and qualities of the same. *And also* that the said lessee will and shall at all reasonable times during the said term hereby created, permit and also assist the lessor, either by herself, or by or together with her agents and other persons by her employed in that behalf, peaceably to enter into and descend any quarry or quarries, shafts, or excavation upon or under the premises hereby leased, in order to examine, measure, and take plans of the shafts, excavations, and other works thereof, and to view and search all or any part of the same quarries and premises, including the engines, machinery, and apparatus belonging thereto, and ascertain the state and condition thereof respectively, and the manner in which the workings there are being carried on, and the amount of limestone or limestone rock which shall have been raised, or obtained, and removed therefrom, or for any other lawful purpose, and for that purpose to make use of the machinery, tackle, and other apparatus belonging to the said quarry or quarries and works, as often as the said lessor may deem necessary; and so often as upon any such view and search had, any want of reparation or other defect whatsoever in the state and condition of the said quarries and premises, or any default or omission in the working of the same, contrary to the covenants or agreements herein contained of the said lessees shall be discovered, and notice thereof in writing be given to the said lessee by the lessor, all such wants of reparation, defects, defaults, and omissions shall be made good and supplied by and at the expense of the lessee within three calendar months next after such notice thereof shall have been given as aforesaid. *And also* that the said lessee will,

To make a  
survey and  
inspection.



at the expiration or other sooner determination of the said term of twenty-one years, deliver up unto the lessor the said piece of land, quarries, workings, and buildings, and other the premises hereby appointed and leased, in good condition, tenantable repair, and perfect working order, ready for the future working of the same. *And also* will and shall, at the expiration of the said term of twenty-one years, if required by notice in writing from the lessor given to the said lessee three calendar months or upwards previously thereto, leave upon the said premises all the engines, crushing-mills, machinery, and apparatus then being on the said premises (including gear, utensils, implements, iron railways, old iron, and materials then used in and about the works), and all fixtures belonging to the said lessee, or such of the said engines, machinery, and apparatus and fixtures as shall be specified in such notice for the lessor, the same to be taken and paid for at a valuation to be agreed upon by the said lessor and lessee at the expiration or sooner determination of the said term of twenty-one years, or in case of their failing to agree and so differing, to be determined by two arbitrators or their umpire, to be appointed in the usual manner (*d*). *And lastly*, that the said lessee will not nor shall, at any time or times hereafter, assign over or underlet, or in any manner part with the possession of the said piece of land, quarries, powers, and premises hereby appointed and leased, or any of them, or any parts or part thereof, without the previous license in writing of the lessor. *Provided always*, and it is hereby agreed and declared, that in case the rents hereinbefore reserved or either of them shall not be duly paid according to the reservation and covenant for payment of the same respectively hereinbefore contained, and shall continue not to be paid for the space of forty-two days next after any one of the several times whereon the same ought to have been paid, and although no formal demand of payment of the same shall have been made, or if the said lessee shall become bankrupt, or assign his estate or effects, or any part thereof in trust for his creditors, or compound for the payment of his debts, or if any execution shall be levied on his or their

Leaving  
premises in  
repair.

Arbitra-  
tion.

Against  
assigning.

Proviso for  
re-entry.

Covenants  
by lessor.

Notices.

goods and chattels, or in case of breach or non-performance of any covenant or agreement hereinbefore contained on the part of the said lessee to be performed or observed, then and in any of the said cases it shall be lawful for the lessor into and upon the premises hereby leased, or any part thereof in the name of the whole, to re-enter, and the same to have again, as if these presents had not been made, anything hereinbefore contained to the contrary notwithstanding. *And* the said lessor hereby covenants *(e)* with the said lessee that he, the lessee, paying the several rents hereinbefore reserved, and observing and performing the several covenants, conditions, provisoes, and agreements hereinbefore contained, shall peaceably hold, exercise, and enjoy the premises hereby appointed and leased, or mentioned so to be, for and during the said term of twenty-one years without any hindrance or disturbance whatsoever by the said lessor, or any person or persons lawfully or equitably claiming, or to claim under or in trust for her. *And* it is hereby declared that every notice required by these presents to be given to or served upon the said lessee, shall be deemed to have been duly given to or served upon him or them, not only by personal service, but by leaving the same on any part of the said premises hereby apportioned and leased. *And lastly*, that the term "lessor," whenever used in this lease, shall include and be binding upon the heirs and assigns of such lessor; and the term "lessee," the executors, administrators, and assigns of such lessee.

*In witness, &c.*

---

#### LEASE OF A LIMESTONE QUARRY.

*This Indenture*, made the                      day of                      , 1864,  
between Arundel Rogers, of                      , Esq., of the one  
part, and Richard Tonkin, of                      , miner, of the  
other part, *Witnesseth*, that in consideration of the rents,  
covenants, and conditions hereinafter reserved and contained,  
he, the said Arundel Rogers (hereinafter called the lessor)

*(e)* Ante, p. 297.

doth by these presents give and grant unto the said Richard Tonkin (hereinafter called the lessee), the sole and exclusive license, power, and authority to quarry, work, and bring to surface all those strata of limestone lying and being within all that piece or parcel of land situate, &c.; with liberty to carry away and dispose of the produce thereof for his own use and benefit, and for the purposes of this lease, to make or use any existing drains or water-courses for keeping the said quarries free from water, and to erect all such sheds, buildings, engines, machinery, and conveniences upon or near the said quarries as shall be necessary for effectually carrying on the said works, and liberty of ingress, egress, or regress, way, and passage at all times for himself and workmen, and either with or without horses and carriages by and over the existing roads, and to construct any railways or other roads whatsoever to and from the said quarries necessary or convenient for the purposes of this lease. *To have, use, exercise, and enjoy* the said licenses, powers, and authorities, with their appurtenances, unto the said lessee from the            day of           , for the term of fourteen years thence next ensuing, *Yielding and paying* unto the said lessor during the said term the rent or sum of £40 (*f*) by equal quarterly payments on the four usual quarter-days (the first of such payments to be made on the 24th day of June next) free and clear of all rates, taxes, assessments, and impositions whatsoever (property-tax only excepted).

(*Insert such of the covenants, provisoes, and conditions from the last form, as would be applicable—pp. 673-678.*)

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#### LEASE OF A WAY-LEAVE.

*This Indenture*, made the            day of           , 1864, between William Thomas, of            (hereinafter called the lessor), of the one part, and Richard Gibson, of            (hereinafter called the lessee), of the other part, *Witnesseth*, &c., that he, the said lessor, doth by these presents grant and demise unto the said lessee license, power, and autho-

(*f*) Ante, pp. 294, 515.



Descrip-  
tion of  
way.

rity for himself, and his agents, servants, and workmen, to use for the purposes hereinafter mentioned at all times between the hours of                      and                      , *All that railway (g) extending in one continued line from a point, B, in the parish of                      , in the county of                      , to a point, C, in the parish of                      (insert description of way) (g), with liberty to pass and repass along the said line, and with all usual waggons and other carriages drawn by horses, or moved by steam or other engines, to convey all such minerals as shall from time to time be raised or gotten by the lessee out of all that mine (describe the mine); and also to convey all other materials and things which shall be thought necessary or proper for working or carrying on the said mine, and for the purposes aforesaid, to use all the fixed engines, machinery, buildings, and works belonging to the said railway, together with all other privileges and appointments to the said right of way belonging. To have, use, and enjoy the said licenses, powers, authorities, and premises hereby demised unto the said lessee from the 24th day of June, 1864, for the term of fourteen years thence next ensuing, yielding and paying unto the said lessor, yearly and every year, by four equal quarterly payments, on the usual quarter days, the sum of £                      , the first payment to be made on the 29th day of September next. And* the said lessee covenants with the said lessor, that he, the said lessee, will pay to the said lessor the rent hereby reserved at the times aforesaid. *And also will pay all rates, taxes, and other outgoings now charged or hereafter to be chargeable upon the said hereby demised premises. And also shall and will at all times during the said term permit the said lessor, and all persons duly authorized by him, to use and enjoy the said railway for any similar purpose with as little interruption as possible, and enter into and adopt all reasonable arrangements which shall be proposed from time to time by the said lessor in that behalf. And also shall at all times do as little injury as possible to the said railway and the sides, rails, fences, and drains thereof, and the buildings, works, and property connected therewith. And also shall and will during the said term, except during*

Covenants  
by lessee.

the last year thereof, contribute his share of all such reasonable and proper costs as shall be required to be incurred for the laying of new rails, or the necessary repair or support of the said railway, and the sides, rails, fences, drains, and walls belonging thereto, and so much of the engines, rollers, ropes, buildings, machinery, and works held therewith as shall be used and enjoyed by the said lessee in common with other persons. *And also* shall and will at all times, during the said term, keep and preserve the said railway, buildings, fixed engines, machinery, rollers, ropes, and works hereby authorized to be used and enjoyed in common as aforesaid, in good repair, and fit for the purposes of the licenses, powers, and authorities hereby given. *Provided always*, and it is hereby agreed and declared, that if at any time during the term hereby granted the said lessee shall neglect, refuse, or fail to perform any of the covenants and agreements herein contained on his part to be observed and performed, then it shall be lawful for the said lessor by notice in writing, signed by him and delivered to the said lessee, or left at his usual or last place of residence or abode, to declare that this lease, and the license, powers, and authorities hereby granted, shall determine, and thereupon this present lease shall be determined and absolutely void, except in respect of any previous breach of the covenants, conditions, and agreements herein contained. *Provided also* (insert power to distrain, similar to pp. 635, 656; a covenant for quiet enjoyment, ante, p. 647; a proviso for binding the legal representatives of lessor and lessee respectively, ante, p. 652; and if the lessor himself holds under a lease, insert a covenant for performing and keeping the covenants of the original lease).

Power for  
lessor to  
terminate  
lease.

*In witness, &c.*

#### LEASE BY DIRECTION OF THE COURT OF CHANCERY.

*This Indenture*, made the                      day of                      (as  
to the terms and provisions with the approbation of the Vice-Chancellor                      , as appears by the certificate of the chief clerk of the said judge, dated the                      day of                      , 1864, in the matter of an Act passed in the

Approval  
of the  
Court of  
Chancery

19th and 20th years of the reign of Her present Majesty Queen Victoria, c. 120, intituled "An Act to facilitate Leases and Sales of Settled Estates" (*h*), and in the matter of the Pendarves Estate, situate in the parish of \_\_\_\_\_, in the county of \_\_\_\_\_; and as to the persons named as lessors, subject to an order of the said court, to be obtained for that purpose in the said matter, and which order is intended to be endorsed upon these presents). *Between, &c.* Witnesseth, &c., they, the said lessors, in exercise of the power for that purpose vested in them by the said recited order of the Court of Chancery do and each of them doth by these presents grant and lease unto the said lessee. (*All, &c., ante, pp. 625, 652, 670, and insert such of the covenants, provisoes, and conditions from the preceding forms as would be applicable.*) And it is hereby lastly declared and agreed that the said lessors shall stand possessed of, and interested in this lease upon trust to apply the rents and royalties hereby reserved, and to act in respect of the covenants, provisions, and conditions herein contained, as shall be directed by the Court of Chancery in the matter of the Act of Parliament and of the said Settled Estates herein referred to.

*In witness, &c.*

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#### LEASE UNDER A POWER.

*This Indenture*, made the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 1864, between \_\_\_\_\_ (hereinafter called the lessor), of the one part, and \_\_\_\_\_ (hereinafter called the lessee), of the other part. *Whereas* by indenture dated the 1st day of April, 1864, and made between, &c., all the lands, tenements, and hereditaments, with their appurtenances, hereinafter described, were conveyed unto and to the use of the said lessor and his assigns for life, with a limitation over to the use of trustees and their heirs during the life of the said lessor, in trust for him and his assigns, and after his decease to and for the several other uses and trusts therein mentioned, with the ultimate reversion to the

(*h*) *Ante*, p. 280.



use of the said lessor, his heirs and assigns for ever; and in the said indenture was contained a power enabling the said lessor to demise or lease. (*Recite the power.*) *Now this indenture witnesseth*, that in consideration of the premises and of the rents, covenants, provisoes, and agreements hereinafter contained, and on the part of the lessee to be paid, observed, and performed, he, the said lessor, in pursuance and execution of the power (i) or authority to him for that power given in and by the said recited indenture, and of every other power enabling him in this behalf, doth by these presents grant and demise unto the said lessee. (*Licenses to search for minerals, with description of premises, covenants, provisoes, and conditions, as at page 611, or 624, 652.*)

---

LEASE UNDER A POWER, THE LESSOR BEING ALSO  
TENANT FOR LIFE.

*This Indenture*, made the       day of       , 1864, *between* the Right Honourable Gertrude Lady       , widow (hereinafter called the lessor), of the one part, and William Thomas and Richard Glasson, both of       (hereinafter called the lessees), of the other part, *Witnesseth*, that in consideration of the rent, royalties, or dues and covenants hereinafter reserved and contained respectively on the part of the said lessees, to be respectively rendered and kept, the said lessor by virtue and in exercise of the power (i) given to her for this purpose by the last Will and testament, dated the       day of January,       , of her late husband the Right Hon. W.       , who died on the       day of       , and whose said Will was proved in the Prerogative Court of the Archbishop of Canterbury on the       day of April then next following, and by virtue and in exercise of all other powers and authorities in anywise enabling her in this behalf, *doth* by these presents sealed and delivered by her in the presence of the persons whose names are hereupon endorsed as witnesses attesting such her sealing and delivering hereof (*or as directed by the will*),

(i) *Ante*, p. 307.

appoint by way of lease and in subordination to such appointment, by force of her interest under the said will as tenant for life without impeachment of waste, of the lands hereinafter described, grant and lease unto the said lessees all mines, veins, lodes, and beds of tin and tin-ore, copper and copper-ore, lead and lead-ore, and other metals and ores, and all mines and minerals whatsoever (except as hereinafter excepted), within, upon, or under *All* those closes, or pieces, or parcels of land situate in the parish of \_\_\_\_\_, and containing altogether about three hundred acres, be the same more or less, bounded on the north, the west, and part of the east by the sea, on the remaining parts or sides by lands belonging to \_\_\_\_\_, and more particularly described in the schedule hereunder written and delineated in the map drawn on the last skin of these presents, whereon they are distinguished by the red line marking the external boundaries thereof (all which closes, pieces, or parcels of land are hereinafter referred to as the said lands within the limits aforesaid), together with full power and authority for the said lessees, and their agents, servants, workmen, and others by them authorized in that behalf, from time to time and at all times, at their free will and pleasure, to enter upon the said limits. *And* the tin  
(*continue from Lease, p. 613, or from pages 624, 652*).

Liberties  
and powers  
to lessees.

---

LEASE UNDER A POWER AND IN PURSUANCE OF AN  
AGREEMENT ENTERED INTO WITH A DECEASED, THE  
LESSOR BEING ALSO TENANT FOR LIFE.

*This Indenture*, made the \_\_\_\_\_ day of \_\_\_\_\_, 1864,  
*between* the Right Honourable Gertrude Lady \_\_\_\_\_, of  
\_\_\_\_\_, widow, of the one part, and Nicholas Williams, of  
\_\_\_\_\_, of the other part. *Whereas*, under a parol agreement  
between the Right Honourable William late Lord \_\_\_\_\_,  
and parties through whom the said Nicholas Williams de-  
rives title, followed by part performance (or otherwise), the  
said N. W. claims to be entitled to a lease of the colliery,  
coal-field, rights, privileges, and easements, secondly here-

Recital of  
parol  
agreement  
with de-  
ceased.

inafter appointed by way of lease (except as hereinafter excepted), at the royalty, rent, and for the term hereinafter mentioned, and at proper covenants. And the said N. W., under an offer in writing made to the same parties by the said William Lord , followed by a parol acceptance thereof evidenced by subsequent acts (or otherwise), claims to be entitled to a lease of the surface and other lands and hereditaments firstly hereinafter appointed by way of lease (except as hereinafter excepted) for the like term, at the rent hereinafter mentioned and under proper covenants.

*And whereas* the said William late Lord , died on the      day of      , and under his Will which bears date the      day of      (which Will was proved in the Prerogative Court of the Archbishop of Canterbury on the      day of April,      ), the said Gertrude Lady

Power of  
lessor to  
grant lease.

is tenant for life without impeachment of waste of the freehold lands and hereditaments of the said William Lord , within the county of      , with such powers as in the said Will are contained, of granting agricultural leases for not exceeding twenty-one years of the said lands and hereditaments, and Mining Leases for not exceeding sixty years of mines, quarries, strata, and seams of coal, stone, clay, and other minerals, or metallic or fossil bodies whatsoever (whether previously opened or not), in, or upon, or under the said lands and hereditaments, and of granting thereby (in addition to the particular rights and easements specified in the power here referred to), such privileges generally as should be necessary or usual, or by the person exercising the same power, be deemed reasonable or proper, for discovering and obtaining, cleansing and rendering marketable, disposing of and removing the minerals and bodies before expressed, and putting out of the way all refuse materials. *And whereas*, since the death of the said William late Lord , the said N. W. hath applied to the said Gertrude Lady , to grant to him such leases as aforesaid, and for quieting all disputes she hath agreed to make, and he hath agreed to accept such appointments by way of lease and demises as hereinafter are contained of the surface and other lands and here-



ditaments first hereinafter described (except as hereinafter excepted), and of the colliery, coal-field, rights, easements, and privileges secondly hereinafter described (except as hereinafter excepted respectively). *Now this indenture witnesseth*, that the said Gertrude Lady (hereinafter called the lessor), in pursuance and performance of the said agreement on her part, and also in performance or satisfaction of the said agreements of the said William Lord , and in consideration of the rents, covenants, and provisoes hereinafter reserved and contained, and by virtue and in exercise of the powers (j) given to her for this purpose by the said Will of her late husband the said William Lord , and of all other powers her in this behalf enabling, *doth* by these presents, sealed and delivered by her in the presence of the person whose name is hereupon endorsed as a witness (*or as directed by the power*), attesting such her sealing and delivery hereof, appoint by way of lease and (in subordination to such appointment) by force of her interest, grant and lease unto the said N. W. (hereinafter called the lessee), *first, All those several closes, pieces, or parcels of land situate, &c.; secondly, All that colliery, or coal mine, and seams of coal of every description, &c. With full liberty, &c. (continue as at page 652, if the lease is of lands and a colliery in Wales; or alter the description if the lease is to be of a colliery only in the North of England, and proceed as at page 624; if the lease is of a tin, copper, or lead mine, proceed as at p. 611).*

Demise of  
lands.

Colliery.

*In witness, &c.*

(j) Ante, p. 307.

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